(26,119)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 652.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, APPELLANT,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1917.

1 Pleas of the District Court of the United States for the District of Indiana, Begun and Holden at the United States Courthouse, in the City of Indianapolis, in said District, on the First Tuesday in May, in the Year of Our Lord One Thousand Nine Hundred and Seventeen, Before the Honorable Albert B. Anderson, Judge of said District Court.

In Equity.

No. 215.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS

vs.

STEPHEN P. CORBOY, Drainage Commissioner of the Calumet Ditch.

Be it remembered that heretofore, to-wit: At the November Term of said Court, on the 30th day of March, 1917, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings in the above entitled cause were had, to-wit:

Comes now the complainant by Messrs. Isham, Lincoln and Beale, and Smith, Remster, Hornbrook and Smith, and files a Bill of complaint in the words and figures following, to-wit:

2 UNITED STATES OF AMERICA,
District of Indiana, ss:

In the District Court of the United States for the District of Indiana.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS

v.

STEPHEN P. CORBOY, Drainage Commissioner of the Calumet Ditch.

To the Honorable Judges of the District Court of the United States for the District of Indiana:

Public Service Company of Northern Illinois, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, having its principal office in the City of Chicago, Illinois, brings this its bill of complaint against Stephen P. Corboy, Drainage Commissioner for the construction of the Calumet Ditch under the proceeding now pending in the Circuit Court of Porter County, Indiana, entitled, "In the Matter of the Calumet Ditch", Cause No. 764, said Stephen P. Corboy being a citizen of the State of Indiana and a resident of said Porter County.

Thereupon, complainant states as follows:

1. Complainant is a public utility as defined in an Act of the Legislature of the State of Illinois entitled, "An Act to Provide for the Regulation of Public Utilities", approved June 30, 1913,
3 and in force January 1, 1914, and is subject to the provisions of that Act. Complainant for several years has been and is now engaged in the business of generating, selling and distributing electrical energy, gas and steam throughout the northern portion of the State of Illinois, and is authorized by its charter so to do.

2. Complainant generates such electrical energy at its various generating stations located in different parts of said territory, some of which are operated by steam power and others by water power with steam power as an auxiliary. The energy so generated is generally transmitted from the generating stations to complainant's various substations from which it is distributed directly to its customers, but in some instances complainant distributes such energy directly to its customers from its generating stations. Some of its generating stations are also connected with other generating stations in order that the energy generated at one station may be transmitted to another generating station, from which it is distributed to various substations and customers of complainant.

3. One of the electrical generating stations operated by complainant is located upon the south bank of the Little Calumet River, a short distance from the City of Blue Island, in Cook County, Illinois. The land owned by complainant upon which said station is located, and which is used by complainant in connection with the
4 operation of said station extends to the center line of said river and has a total area of approximately thirty-eight (38) acres and a frontage of approximately fourteen hundred and fifty (1450) feet upon said river. As such riparian owner of land upon said river complainant is entitled, under the law of Illinois, to the use and enjoyment of the water in said river for the operation of said station and to have such water flow in its natural and accustomed course without obstruction or diversion of such flow at any point upon said river above said station. Said station consists of two buildings united for purposes of operation, one of which belongs to complainant and the other to Commonwealth Edison Company, likewise a public utility corporation organized and existing under and by virtue of the laws of the State of Illinois, and engaged in the business of generating and selling electrical energy in said City of Chicago. The building of said station belonging to complainant will hereinafter be sometimes referred to as the "main station" and the building belonging to said Commonwealth Edison Company as the "Addition". The main station and Addition consist of a concrete steel and brick fireproof building approximately three hundred ten (310) feet long by two hundred ten (210) feet wide, containing the most modern steam boiler and turbine electric generating equipment. The main station now contains five steam turbo-generators for the generating of electrical energy, having a total rated capacity of twenty-three thousand five hundred (23,500) kilowatts of energy, which are now operated by complainant by means of steam supplied from eight water

5 tube boilers of four hundred horse power capacity each, and twelve such boilers of five hundred horse power capacity each. The Addition will soon be completed and will contain two steam turbo-generators having a capacity of twelve thousand five hundred kilowatts each, which will be operated by steam supplied from four water tube boilers having a capacity of twelve hundred horse power each. One of said turbines will be in readiness for operation within one month, and the other of said turbines within seven months from the date hereof. The Addition is being built upon land now owned by complainant and leased by it to said Commonwealth Edison Company for a term of ten years ending January 2, 1926, under a lease dated January 2, 1916, between complainant and said Commonwealth Edison Company. The two turbines and all other equipment installed by said Commonwealth Edison Company in the Addition are installed by it under and pursuant to the terms of said lease. Upon the termination of said lease complainant is required by the terms thereof to purchase, and will then purchase, the Addition and all equipment therein belonging to said Commonwealth Edison Company. The Addition will be operated by complainant during the entire term of said lease under an operating agreement dated January 2, 1916, between complainant and said Commonwealth Edison Company, under which agreement complainant is obliged to supply and will supply to said Commonwealth Edison Company from the main station and the Addition at substantially all times when required by it twenty-five thousand kilowatts of electrical energy, or such amount less than twenty-five thousand kilowatts as may be generated 6 in the Addition, plus any surplus energy generated in the main station after complainant's other customers are supplied. In addition complainant is now supplying to said Commonwealth Edison Company fifty-two hundred kilowatts of electrical energy from the main station. Said lease and said operating agreement above mentioned were made under and pursuant to authority granted to complainant and said Commonwealth Edison Company by the State Public Utilities Commission of Illinois under the Act of the Illinois Legislature above mentioned. All of the energy so delivered by complainant to said Commonwealth Edison Company will be sold and distributed by it to its various customers in said City of Chicago. The total amount expended and to be expended in the construction of the main station and the Addition and in equipping the station and the Addition for operation, including the two turbines now being installed in the Addition, aforesaid, exceeds Two Million Dollars.

4. The electrical energy now being generated in the main station, except so much thereof as is delivered to said Commonwealth Edison Company for use in the City of Chicago, is distributed by complainant to more than fifty different substations, and at times a portion of said energy is transmitted by complainant to more than eight other generating stations operated by complainant. The total number of customers supplied with such energy by complainant from the main station, either directly or through its various substations, ex- 7 ceeds fifty-one thousand five hundred, and the total area so supplied exceeds three thousand square miles, having a population of more than two hundred and sixty thousand persons.

5. It is absolutely essential for the efficient and economical operation of a modern electrical generating station operated by steam power that such station be located upon or in close proximity to a stream of running water or a large body of water. In such a station the turbine which propels the electrical generator which generates the electrical energy is operated by means of steam power, and in order that such steam power may be utilized most efficiently and economically, the exhaust steam from the turbine must be discharged into a condenser, which usually consists of a shell containing a series of pipes set closely together, around which pipes the steam is discharged and through which pipes is constantly passed a flow of cooling water. By this means all exhaust steam is rapidly condensed into water, which is again used in the boilers and is again converted into steam. The water which flows through the pipes of the condenser becomes heated by contact with the pipes around which the exhaust steam passes and is then drawn off and discharged into the stream at a point below the station. If such exhaust steam be discharged into the air instead of into a condenser the propelling power of the turbine is greatly reduced, and the generating capacity of the station is correspondingly reduced. Also if such exhaust steam be discharged into the air instead of into a condenser the quantity of steam required to generate a kilowatt hour of electrical energy
8 is increased about four-fold and the cost of operating a station without the use of condensers is therefore so great as to be practically prohibitive in the district in which complainant conducts its business, and it is therefore absolutely essential for the efficient and economical operation of such a station that such condensers be used.

6. Condensers of the kind described in the foregoing paragraph are now being used and will continue to be used by complainant in the operation of its main station at Blue Island and will be used by complainant in the operation of the Addition when completed. The water used for cooling such condensers is and will be drawn by complainant from the Little Calumet River at a point adjacent to the station and after passing through the condensers is and will be discharged into the river down stream from the point of intake. It is absolutely essential for the operation of the station that the water flow in the river at a sufficient velocity and in a sufficient volume to carry away the heated water discharged from the condensers and to supply a quantity of condensing water sufficient for the operation of the station at its full generating capacity. Under present conditions the velocity of flow and volume of water in the river at the station are generally sufficient to carry off the heated water discharged from the condensers, and will ordinarily be sufficient to carry off
9 at all times in the year the heated water discharged from the condensers of the station (including the Addition) after said two additional turbines shall have been installed in the Addition and are in operation.

7. The Little Calumet River has its source in the western part of La Porte County, Indiana, and flows thence westerly across Porter and Lake Counties, Indiana, into Cook County, Illinois, where after

making a sharp turn near Blue Island it joins the Grad Calumet River which flows into Lake Michigan at South Chicago, Illinois. The Little Calumet River has on the south a tributary known as Salt Creek, which has its origin near Valparaiso in Porter County and which takes a northwesterly course to its intersection with the Little Calumet River at a point about four miles east of the west line of Porter County and about two miles south of the south shore of Lake Michigan. The Little Calumet River also has a tributary with its origin near Crown Point in Lake County, known as Deep River, which intersects the Little Calumet River at a point about 4¾ miles west of the west line of Porter County and about 3 miles south of the south shore of Lake Michigan. The Little Calumet River parallels the south shore of Lake Michigan through its course in Indiana. Between the lake and the river in Porter and Lake Counties extends a continuous ridge of dry land about thirty feet in height above the surface of the lake on the north, and approximately
10 twenty feet above the bottom of the river on the south. The Little Calumet River drains a district of approximately six hundred square miles above complainant's Blue Island station, such district embracing portions of La Porte, Porter and Lake Counties in Indiana and a portion of Cook County in Illinois. The flow of water from this drainage district is therefore westerly through the Little Calumet River past complainant's Blue Island station into the Grand Calumet River in Cook County, Illinois, and thence into Lake Michigan at South Chicago. Attached hereto, marked Exhibit "A," and hereby made a part hereof, is a blue print showing the drainage district affected by the Little Calumet River and its tributaries. The Little Calumet River affords the only sufficient supply of water in the locality in which complainant's Blue Island Station is located for the operation of a large modern steam driven power station with suitable railroad connections for such a station.

8. During its October term, 1908, there was instituted in the Circuit Court of Porter County, Indiana, under the Drainage Act passed by the Legislature of the State of Indiana on March 11, 1907, a proceeding to establish and construct a ditch in that county extending from the Little Calumet River in a northerly direction to Lake Michigan. Said proceeding is entitled "In the Matter of the Calumet Ditch," and bears Cause No. 764. A final decree was entered in said proceeding on March 22, 1911, ordering that such ditch be established and constructed. Thereafter, on April
11 21, 1914, upon appeal to the Supreme Court of Indiana said decree was affirmed, and thereafter on January 8, 1917, upon writ of error to the Supreme Court of the State of Indiana, the judgment of said Court was affirmed by the Supreme Court of the United States. Complainant is not now and never has been a party to said proceeding.

9. It is proposed that said ditch shall consist of a main ditch and a branch ditch, known as the Salt Creek Arm. The main ditch will commence at a point in Lake Michigan approximately two and one-third miles east of the west line of Porter County and will run thence

in a southerly direction until it intersects the Little Calumet River; thence in a southwesterly direction into Lake County to a point upon said river approximately three and one-half miles west of the west line of Porter County; thence again in a southerly direction approximately three-quarters of a mile to the Deep River. The main ditch will intersect the Little Calumet River a number of times throughout the course of the ditch, and will practically create a new channel for said River. The Salt Creek Arm commences on the main ditch at a point approximately one and one-half miles distant from Lake Michigan and runs thence easterly a distance of approximately one and one-half miles to the intersection of the Little Calumet River and the Salt Creek Arm. Unless otherwise stated the word "ditch" as hereinafter used will refer to and mean both the main ditch
12 and the branch ditch. By means of said ditch it is proposed to divert the water of the Little Calumet River and its said tributaries in La Porte and Porter Counties and in a portion of Lake County from its normal, natural flow down the river to a northerly direction through said ditch into Lake Michigan. It was found by the Circuit Court of Porter County in the decree above mentioned that the total area proposed to be drained by said ditch would be approximately three hundred and fifty square miles, which is more than one-half of the entire area of the district drained by the Little Calumet River and its said tributaries lying above complainant's Blue Island station. Such diversion of the flow of water in said river and its said tributaries will reduce very largely the velocity of flow and volume of water in said river at complainant's Blue Island station, so that during the dry season of the year, that is, during the months of August, September and October, complainant will be unable to operate said station (including the Addition) with the same degree of efficiency and economy as said station is at present being operated and will continue to be operated if said diversion of flow is not permitted. It is difficult to state exactly to what extent the velocity of flow and volume of water in said river at said station will be reduced by such proposed diversion of flow of water, but complainant is advised by competent engineers, and believes, and therefore states as a fact that if said ditch is built and operated, more than one-half of the volume of water normally and naturally flowing in said river
13 will be diverted into said ditch, and that because of such diversion the velocity of flow and volume of water in said river at said station will be less than one-half of its present velocity and volume at that point. Under such conditions of reduced velocity of flow and volume of water in said river the generating capacity of said station (including the Addition) during such dry season of the year will be less than twenty-four thousand (24,000) kilowatts of energy or less than one-half of the total capacity of said station (including the Addition). Under such operating conditions complainant will be unable to supply from said station to its various customers the amount of electrical energy which it has contracted to supply to them and will thereby sustain great and irreparable damage and injury. Complainant avers that such damage will largely exceed Three Thousand Dollars.

10. Under said decree of the Circuit Court of Porter County entered on March 22, 1911, the defendant, Stephen P. Corboy, was assigned Commissioner for the construction of said ditch and said defendant is now acting as such Commissioner and proposes to proceed with the construction and completion of said ditch. No portion of said ditch has yet been constructed. Defendant claims the right to construct and maintain said ditch under and by virtue of said proceeding instituted under the authority of the Drainage Act above mentioned. Complainant avers that the construction and maintenance of said ditch will alter and divert from its normal
14 course and channel the flow of water in the Little Calumet River, and will thereby interfere with the flow of an interstate river, and that the construction and maintenance of said ditch are for that reason illegal and void. Complainant further avers that the construction and maintenance of said ditch and the alteration and diversion thereby of the flow of water in the Little Calumet River and its said tributaries from its normal course and channel will injure and damage complainant's property in Illinois, and will deprive complainant of its property without due process of law, in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and that the construction and maintenance of said ditch are for that reason illegal and void. Complainant further avers that said decree of the Circuit Court of Porter County in said proceeding authorizing the construction and maintenance of said ditch and the alteration and diversion of the flow of water in said river from its normal, natural course and channel is an interference with the flow of an interstate river, and injures and damages complainant's property in Illinois, and deprives complainant of its property without due process of law, in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and is for such reasons illegal and void. Complainant further avers that said Drainage Act under which said proceeding was brought, to the extent that such Act authorizes the construction and
15 maintenance of said ditch and the alteration and diversion of the flow of water in said Little Calumet River and its said tributaries from its normal, natural course and channel to the injury and damage of complainant's property in Illinois, deprives complainant of its property without due process of law, and is in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and is for that reason illegal and void.

11. Complainant therefore prays that the defendant may be required to make full, true and perfect answer to all the allegations herein (but not under oath, an answer under oath being hereby expressly waived); that the construction and maintenance of said ditch may be held to be an interference with the normal, natural flow of water in an interstate river, and to deprive complainant of its property without due process of law, in conflict with and in violation of the fourteenth Amendment to the Constitution of the United States, and for such reasons illegal and void; that said decree of the Circuit Court of Porter County in said proceeding authorizing the construction and maintenance of said ditch and the

alteration and diversion of the flow of water in said river from its normal, natural course and channel may be held to be an interference with the flow of an interstate river, and to injure and damage complainant's property in Illinois, and to deprive complainant of its property without due process of law, in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and for such reasons illegal and void; that said Drainage Act, to the extent that it authorizes the construction and maintenance of said ditch and the alteration and diversion of the flow of water in said river from its normal, natural course and channel to the injury and damage of complainant's property in Illinois, may be held to deprive complainant of its property without due process of law and to be in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and for that reason illegal and void; that the construction and maintenance of said ditch and said proceeding authorizing the same may be held generally illegal and void as against complainant; that a perpetual injunction may be issued restraining the defendant, his agents and representatives, from constructing and maintaining said ditch, and that complainant may have such other and further relief in the premises as the circumstances may require and to your Honors may seem meet.

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Complainant further prays that a temporary injunction may forthwith be issued directed to said defendant, his agents and representatives, restraining him and them from constructing said ditch until the further order of this Court.

Complainant further prays that a writ of subpœna may issue out of and under the seal of this Court directed to the defendant, Stephen P. Corboy, Commissioner for the construction of said ditch, requiring him to appear and answer this bill of complaint.

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PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,

By FRANK J. BAKER, *Its Vice-President.*

SMITH, REMSTER, HORNBROOK & SMITH,
Its Solicitors.

ISHAM, LINCOLN & BEALE,
Solicitors and of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

Frank J. Baker, being first duly sworn, deposes and says that he is Vice President of Public Service Company of Northern Illinois, complainant in the foregoing bill of complaint; that he has read said bill and knows the matters therein stated, and that the same are true, except such allegations thereof as are therein stated to be made upon information and belief, and as to such allegations he believes them to be true.

FRANK J. BAKER.

Subscribed and sworn to before me this 29th day of March, A. D. 1917.

[SEAL.]

FRANK R. EVERS,
Notary Public.

(Here follows map marked p. 18.)

19 And thereupon, there issued out of the office of the Clerk of the District Court of the United States for the District of Indiana, the following subpœna in Chancery, directed to the Marshal of said District, which said subpœna is in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the Marshal of the District of Indiana, Greeting:

You are hereby commanded to summon Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, Valparaiso, if he be found in your District, to be and appear in the District Court of the United States, for the District of Indiana, aforesaid, at Indianapolis, on the 19th day of April next, to answer a certain Bill in Equity filed and exhibited in said Court against him by Public Service Company of Northern Illinois. Hereof he is not to fail under the penalty of the Law thence ensuing.

And have you then and there this writ.

Witness, the Honorable Albert B. Anderson, Judge of said Court, and the seal thereof, this 30th day of March, 1917.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

Memorandum.

The said defendant is required to file his answer or other defense in this suit in the Clerk's Office of said Court on or before the twentieth day after service, excluding the day thereof; otherwise the said Bill may be taken pro confesso.

NOBLE C. BUTLER, *Clerk.*

And afterwards, to-wit: on the 5th day of April, 1917, said subpœna was returned into the office of the said Clerk, with the following endorsement of the Marshal thereon:

DISTRICT OF INDIANA:

I received this Writ at Indianapolis, in said District, at — o'clock — M., on the 3rd day of April, A. D. 1917, and served the same in Porter County, as follows:

20 3rd day of April, 1917, by copy upon the within named Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, by reading the same to and within his hearing, and by delivering a true copy of this writ to him, at Valparaiso, Porter County, Indiana, April 3, 1917.

MARK STOREN,
U. S. Marshal,
By FRANK S. REAM, *Deputy.*

And afterwards, to-wit: At the November Term of said Court, on the 23rd day of April, 1917, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had to-wit:

Comes now the defendant by his solicitors and files an answer with a motion to dismiss the Bill of Complaint herein, which answer and motion are in the words and figures following, to-wit:

The Answer of Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, to the Bill of Complaint of Public Service Company of Northern Illinois, Complainant.

To the Honorable Judges of the District Court of the United States for the District of Indiana:

The defendant now, and at all times, saving and reserving to himself all manner of benefit and advantage of exception for the many errors and insufficiencies in the complainant's said bill of complaint, or to so much, or such parts thereof as this defendant is advised is material for him to make answer unto, answers and says:

1.

That defendant is without knowledge of whether said complainant is a public utility, or subject to control as such, as alleged in its bill of complaint; that defendant is also without knowledge as to the character of complainant's corporate organization or authority, and that he is without knowledge as to the character, extent or value of business in which said complainant is engaged, save
21 that it is engaged, to some extent unknown to defendant, in generating, distributing or selling electrical energy in some portion of the State of Illinois.

2.

That defendant is without knowledge as to what generating stations, if any, complainant has other than the electrical generating station hereinafter mentioned in paragraph three of this answer and that defendant is without knowledge as to manner of operation, or connections, or manner of business of such other stations, and that this defendant is also without knowledge of complainant's alleged substations or of the character of business connected therewith.

3.

This defendant admits that complainant is operating an electrical generating station located near the Little Calumet River, a short distance from the city of Blue Island, Cook County, Illinois, that being the station particularly referred to in the bill of complaint herein, but that defendant is without knowledge as to whether

said station is situate on the bank of said river. That this defendant it without knowledge as to whether complainant is the owner of the land occupied by said station, or of *what* used in connection with the operation of said station, and is without knowledge as to the extent of said land or as to the buildings or machinery thereon, or as to the cost or value thereof, or as to complainant's relations with, or obligations to, the Commonwealth Edison Company, or as to the extent of its business, or as to the plans for any further development of said property, or as to the cost *of* value *of* extent of the development had or to be had upon said property, and defendant is also without knowledge as to the authority of complainant or of said Commonwealth Edison Company to enter into the lease and obligations set forth in said bill of complaint, or as to whether there is any such lease. That this defendant is without knowledge whether the property used by complainant for its said generating station has a frontage on said Little Calumet River, but defendant says that complainant does not own or have any interest in the river north of the median line thereof; that this de-
22 fendant is without knowledge as to whether said complainant has any riparian right in said river to the south of said line, but that defendant denies that complainant, as a riparian owner on said stream, if such it be, is entitled under the law of Illinois, as against this defendant, to have the water of said river flow in its natural and accustomed course without obstruction or diversion of such flow either at or above said station.

4.

That this defendant is without knowledge as to the boilers, condensers or machinery of complainant, or the distribution or extent of distribution by complainant, or the Commonwealth Edison Company, of electrical energy generated at said station, or as to what quantity of water may be used or intended to be used by complainant, or as to the value of said energy, or as to the number of complainant's customers, or of said Commonwealth Edison Company's customers, or as to the area supplied by complainant, or said Commonwealth Edison Company, with such energy, or as to the population within such area; that the defendant is without knowledge of the owners of or character of the buildings alleged to comprise said station, and is without knowledge whether said Commonwealth Edison Company is a public utility or as to the character or extent of its business.

5.

This defendant denies that it is essential to the efficient and economical operation of any modern electrical generating station operated by steam power that it should be located upon or in close proximity to a stream of running water or large body of water, and particularly does defendant deny that any such condition is necessary or important in the operation of the said plants

at Blue Island described in said bill of complaint, either as they may now exist or as they may hereafter be developed. That this defendant is without knowledge whether it is economical and advantageous to discharge the exhaust steam of such a plant into a condenser, but this defendant alleges that there are a number of other means of performing the work of condensation alleged by complainant in its bill of complaint to be necessary, or here-
23 after required, which are not dependent upon the use of water, and which are quite as inexpensive, economical, efficient and long lived as those described in said bill; that there are other methods of condensing steam which are quite as inexpensive, economical, efficient and long lived as those described by complainant in its bill of complaint, which are quite as suitable for use in the development of steam in the power plant described by complainant as existing and contemplated at the station complainant described as situate on said river that are only partially dependent upon the use of water, and that there is, and at all times will be, notwithstanding the diversion of said Little Calument River as it is alleged in said bill of compiaint is proposed, more than sufficient water in such stream for the accomplishment of the ends desired by the use of any of such other methods. That any of such other methods of condensation of steam for use in such a plant as complainant alleges it has and contemplates could be installed at an expense of not to exceed $2000, and this defendant further aileges that notwithstanding the making of the diversion of the waters of said stream as alleged in said bill of complaint to be proposed. it would be possible for said complain-t, at an expense not exceeding two thousand dollars, to be used and bestowed wholly within the property alieged to be owned by it, so to adapt the same as to use its said condensers now existing or as proposed, in manner and form as complainant in its bill of complaint shows that it proposed to use them, and that this can be done without additional expense for operation. This defendant further answering says that the waters of said river are, and at all times have been and will continue at all times hereafter to be, whether said river is diverted or not, wholly unfit to use for condensing purposes. Defendant further alleges that about one year ago complainant entered into a contract in writing, which is still in force, whereby it acquired the right to take and at all times receive from what is known as the Calumet Sag Channel, a public waterway under charge of a public
24 corporation of the State of Illinois, to-wit: The Sanitary District of Chicago, as soon as said canal is completed, water from said canal, wholly fitted -or condensation purposes, to the full extent that is or may be required by complainant and by said addition; that complainant will be able to obtain, and at all times to continue to use, said water at an expense of not exceeding $2500 for installation. and that this right exists in said complainant in perpetuity and without cost to it for the use of water. That complainant will be able to obtain said water from said canal before any of the water in said river is diverted. Defendant further answering says that the water in said river is, and at all times will be,

so far insufficient as to render complainant's present and contemplated methods of condensation, as set forth in its bill of complaint, impractical and valueless.

And this defendant further answering says that it was not until long after the establishment of the drainage system in Indiana alleged in said bill of complaint to have been had by the judgment and decree of the Porter Circuit Court of Indiana that anyone had or used any condensing apparatus on, or in connection with, said property, but, on the contrary, that no use of the water of said stream was made by anyone until long after the entry of the decree establishing said drain, save to take from said river a small quantity of water for use in the steam boilers then on said property, not exceeding in volume one per centum of the water of said river, at its lowest state, and that any changes or improvements which have since been made on said property were made with full notice and knowledge of said proceeding and decree establishing said drain by said complainant.

6.

This defendant specifically denies that it is, or will be, necessary for the operation of said station and its addition that the full flow of said river be had, except as complainant uses its present methods of condensing the steam, but defendant says that if there is to be any such development of steam power upon said property as complainant alleges to be contemplated, it will thereby be rendered necessary to cease condensation, or to substitute some other method of condensation for more than ten months during each and every year, even on the assumption that the waters of said river, as it now exists, in its varying stages, are wholly used by said complainant. Defendant further answering says that, with complainant's present method of condensation as set forth in its bill of complaint, all of the water of said river, on the assumption that it has its accustomed volume and flow, would be insufficient for complainant's purposes in condensing the steam it alleges that it is now generating at said station, and that such deficiency would exist during more than five months in each and every year. And this defendant further answering says that if complainant is now developing the steam power at said station which it alleges, and is dependent wholly upon the water of said river for condensation purposes, there are long periods during each and every year in which its steam is exhausted directly into the air, without any condensation whatever.

7.

This defendant admits that the general course of the Little Calumet River is as described in complainant's bill of complaint, but defendant alleges that said river has other tributaries and sources of supply in Indiana and Illinois above said station which are only partially shown by said bill of complaint. This defendant says that

the drainage area of said river above said station is approximately six hundred square miles, but he avers that the whole drainage area of said river is approximately seven hundred square miles, and he further avers that only the waters of a territory of three hundred and fifty square miles on the upper reaches of said river and in the State of Indiana will be diverted; that notwithstanding the diverting of the stream as it is alleged is contemplated by the carrying on and consummation of the work of this defendant commissioner, the same stream will still remain, at all points in Illinois, large and substantial in character, with a reasonable degree of current, at all times in the year, which river will be sufficient in volume
26 and velocity for all the reasonable wants of all riparian proprietors on the said stream in Illinois. Defendant denies that the Little Calumet River affords the only sufficient source of supply of water in the locality in which said station is located for the operation of a large, modern steam driven power station with suitable railroad connections for such a station.

8.

Defendant admits the institution of the proceeding to establish and construct a drain as alleged in paragraph 8 of complainant's bill of complaint. He further admits the rendition of a final decree in said proceeding by said court establishing said drain and ordering the construction of the same, and he says that said decree was rendered March 11, A. D. 1911. He admits that from said final decree an appeal was prosecuted to the Supreme Court of Indiana, wherein said decree was afterwards affirmed, and defendant further admits that a writ of error was prosecuted from the final judgment of said Supreme Court in said cause to the Supreme Court of the United States, wherein the said judgment of the Supreme Court of Indiana was afterwards affirmed. That in said proceeding, and while the same was pending in said Supreme Court of Indiana, there was duly drawn in question by certain of the parties defendant thereto, who were appellants in said cause, the power of the court below to divert said st-eam because of its interstate character, but that said Supreme Court held that that fact did not aggrieve said appellants, and, as stated, affirmed the judgment of said lower court, and also denied, without opinion on the points so raised, a petition for a rehearing duly filed by said appellants, wherein the jurisdiction of said lower court over the subject-matter was duly challenged, in terms as follows: "And your petitioners further submit that inasmuch as the Porter Circuit Court did not acquire lawful jurisdiction in rem over the rights and properties of these petitioners, that the proceedings, judgments and decree against them, herein, is to deprive them of property without due process of law, and in violation of the provision in that behalf, in the Fourteenth Amendment to the Constitution of the United States. And this because there cannot
27 be due process *is* a suit in rem until the res is lawfully seized as required by statute. Second. The Supreme Court of Indiana erred in holding and deciding the Porter Circuit Court had

the power and jurisdiction to compel these appellants and each of them severally to permit the State of Indiana and its officers and agents to make, dig and maintain a new channel, or 'cut-off,' for the said Little Calumet River, being an interstate river, under, through and across the several railroad properties, easements, and rights of way of these several petitioners, because: (*a*) The Drainage Act does not empower the State of Indiana to change and divert an interstate natural water-course from its natural water shed. (*b*) And because, by section 8½ of said act, the work of draining the Little Calumet River is vested solely in the officers and the courts of Lake County. (*c*) And because the Little Calumet River is, and is to be used, for interstate commerce. And so the State of Indiana, by the petitioners aforesaid, and its officers, had no right to proceed in rem against the property of these appellants in Porter County." That the said petition as to said points for a rehearing was duly supported by brief by said appellants.

9.

This defendant denies that said *rain* or its branches is correctly described in paragraph nine of complainant's bill of complaint, and also denies that the drainage area is correctly shown upon the map exhibited with said bill, but defendant admits that the said drain and its branches, under the characterization "Burns Ditch," is exhibited with substantial accuracy on the said map. Defendant further alleges that, under issues duly made presenting such matters, the said Circuit Court of Porter County, Indiana, pursuant to request for a special finding of facts and conclusions of law, made by certain railroad companies, defendants to said proceeding, found and stated in said cause the facts specially, and stated its conslusions of law thereon; that, among other things, said findings state that said drain has a main channel in Porter County, Indiana, extending from said river northward a distance of one and one-tenth miles to Lake Michigan; that said drain has a branch extending
28 eastward from said main channel about one and one-half miles to the junction of said river and Salt Creek, and that it has another branch extending from a point in Deep River, about four and three-quarters miles east of the west line of Porter County, extending thence northeasterly across said Calumet River and to said main channel of said drain, to be constructed at such a gradient as to carry the waters of said Deep River to the east of said branch, as well as the waters of said Calumet River between said main channel of said drain in said Porter County and the point where said west arm intercepts said river, to the northeast and to convey such waters into said main channel in said Porter County, and from thence into Lake Michigan. That said court further found as follows: That the waters of said Little Calumet River travel from the intersection of said Salt Creek to its outlet in Lake Michigan at South Chicago, in the State of Illinois, a distance of fifty-four miles, and that the fall thereof in that distance is only 19.5 feet; that said river has natural curves at frequent intervals and at places is partially ob-

structed by washed materials, pilings of bridges, willows, etc.; that it is a slow and sluggish stream; that the capacity of said river is too small for the volume of water supplied by its water shed; that in times of heavy rains and freshets, and at times when snow is melted in large quantities, said river overflows its banks and spreads out over a marsh of 14,000 acres in the counties of Porter and Lake in said State of Indiana; that said marsh, at its widest part in said Porter County, is a half mile or more wide, and in said Lake County is a mile and half wide; that by reason of the overflow of said Calumet River and its failure to carry off the surplus waters flowing along said channel the marsh aforesaid is rendered wet, cold and unfit for cultivation; that said marsh needs drainage, and by the construction of said proposed drain it can be drained and reclaimed so that a large part of it can be farmed and cultivated; that there are numerous highways crossing said marsh which are wet and at times unfit for travel or use because of their wet and overflowed condition; that by the construction of said proposed drain said highways will be drained so that their maintenance for public travel will be less expensive and their use for public travel will be
29 uninterrupted by overflows; that there are numerous railway lines crossing said marsh and said river; that the roadbeds of some of them become wet and saturated with water; that thereby said roadbeds are weakened, making the cost of their maintenance more expensive; that by the construction of said drain said roadbeds will be drained, and thereby rendered more safe for the movement of trains and less expensive to maintain; that the proposed drain will improve the public health and will benefit public highways in Calumet and North townships, in the City of Gary, and in the town of East Gary, all in said county of Lake, and also public highways in Portage township in said Porter County, and a highway in Westchester township in said county; that the proposed drainage will be of public utility, and will be sufficient to properly drain the lands and easements to be affected; that said Little Calumet River has several small tributaries, and one larger tributary known as Hart Ditch entering said Little Calumet River about two and one-half miles east of the state line; that said Hart Ditch has a bed and banks, is several miles in length and flows continuously and seldom, if ever, goes dry, and that practically all of the water coming from the tributaries above mentioned, including the Hart Ditch, which empty into the Little Calumet River west of the point where the proposed Main Ditch hgs its origin will continue to flow down the natural course of said Little Calumet River and discharge their waters into Lake Michigan through said river at South Chicago, as heretofore; that upon said special findings the court stated conclusions of law in favor of the petitioners for said drain; that for the sake of greater certainty a copy of said special findingx and conclusions of law is exhibited herewith and made a part of this answer, and is marked exhibit A; that special findings were only requested in said proceeding by three certain railroad companies, defendants in said cause, but as to all other parties to said proceeding the findings of said court were general and in favor of the petitioners in said

proceedings, and that by the judgment and decree of said court duly given said work of drainage was established and this defend-
30 ant was duly appointed by said court constructions commissioner in said matter, in which capacity, and not otherwise, he is now acting, and that said proceeding is now pending, and within the jurisdiction of said Porter Circuit Court and the judge thereof, for the purpose of constructing and completing the drain so established, and that complainant has brought this suit without the consent or authorization of said court or its judge so to do.

And this defendant further says that each and all of the matters so found by said court were at the time of the filing of the original petition for drainage in said proceeding, ever since has been, and now is, true; that each of said matters were by remonstrance duly in issue in said proceeding; that the drain so established by said court was found and reported by the drainage commissioners in that behalf appointed, in their final report, to be the best and cheapest method of drainage, and that said court, by its finding and decree, assessed with benefits for and on account of said proposed drain approximately 14,000 acres of land in and about said marsh in Porter and Lake Counties aforesaid, and also assessed with such benefits many public and quasi-public easements in said counties situate; that the assessments so made in said Lake County extend from the east line thereof down to a point about two and one-half miles east of the Indiana-Illinois state line; that at the time of the institution of said proceedings, ever since, and now, there were and are large and rapidly growing cities in said Lake County in the vicinity of said marsh, to-wit: Gary, East Chicago and Hammond, and that the presence of said marsh then and now affects deleteriously the health of large numbers of the inhabitants of each of said municipalities; that at the time of the institution of said proceedings the said City of Gary was immediately bounded on the south by said marsh, and many of its inhabitants resided along the edge of said marsh, and that since said time said city has become a city of approximately 40,000 inhabitants, extending territorially over and across said marsh and far to the south thereof, and that many of its inhabitants now reside near and on each side of said marsh; that the time has now come in which, if said overflow of said river in said Lake County can be
31 stopped, as will be done by the construction of said proposed work of drainage, the same marsh in said county of Lake will be built up and inhabited by large numbers of people, and that the presence of said marsh is a heavy clog on the agricultural as well as on the industrial development of the State; that the construction of said drain will not divert more than one-quarter of the flow of said river in Illinois in times of drought; that during the greater part of each and every year there is and will be more water in said river than is necessary to supply all reasonable wants of the people in Illinois and its inhabitants; that in fact the quantity of water now coming down said river is so great in Illinois that vast areas of its lands are thereby rendered of a marsh and overflowed character, and that the carrying out of said work of drainage will benefit the health of large numbers of people in Illinois, to-wit: many thousands, and

that without said work said areas, both in Illinois and in Indiana will be and remain so far flooded as to be worthless; that the said work of drainage will not divert more water from said river than is reasonable, giving due consideration to the wants and needs of the people of the State of Illinois, and the fact is that from said work great good will result to the State of Illinois, as well as to the State of Indiana, and to the inhabitants of each. And this defendant further alleges that conditions in Indiana in respect to said marsh were such, at the time of the original filing of said drainage proceeding, ever since have been, and now are such, as to amount to a public nuisance, and that said nuisance will be abated by said work of drainage; that without imposing an expense upon large numbers of the citizens of the State of Indiana which would confiscate their property and be utterly unreasonable and impractical, there is no other method by which such conditions in Indiana could be abated than by the method here drawn in question. This defendant denies that by said work of drainage the velocity and flow of water in said river will be largely reduced at a point opposite said Blue Island station, or that complainant will be unable to operate said station (including the addition in said bill of complaint mentioned) with the same degree of efficiency and economy as said station is at present be-
32 ing operated, and would continue to be operated gut for said work, and this defendant denies that said complainant or its property will be damaged in any sum whatever by the building and operation of said drain.

And this defendant further answering says that he is without knowledge of each of the following matters: As to the boilers or other equipment at said station or hereafter to be installed or as used therein, as to the operating agreement with said Commonwealth Edison Company, as to the power now or hereafter to be generated at said station, or as to the condensers now or hereafter to be used in connection with said river, or as to their operation. This defendant denies that the flow and volume of said river are now generally sufficient to carry off the heated water from the condensers alleged now to be used at said station, and further denies that the volume and flow of said river will hereafter ordinarily be sufficient for that purpose. Defendant further answering denies that the construction of said drain will change or in any wise affect the channel of the Little Calumet River below Deep river, and he says that said drain will not divert any waters which now find their way into said Little Calumet River below said Deep river, and defendant denies that one-half of the volume of water normally and naturally flowing in said Little Calumet River will be diverted, and further denies that the volume and flow of said river at or above said station will be less than one-half of its present volume and flow at that point.

10.

This defendant denies that the act of the Legislature of Indiana under which said work has been established, or that the decree establishing the same, is void or in any wise invalid, and he further denies

that his proposed work will be unlawful. Defendant further denies that said drain will injure or damage complainant's property, or that it will deprive complainant of its property without due process of law, either in violation of the Fourteenth Amendment to the Constitution of the United States or otherwise. On the contrary, this defendant says that said complainant has no property right in the waters of said stream or any part thereof; that it and its predecessors were at all times charged with knowledge of the duty
33 and power of the State of Indiana to abate said marsh; that the said marsh was conveyed to the State of Indiana from the United States under the general Swamp Land Act of the Congress of the United States, and that thereby said State became and is charged with a duty to drain said lands; that the lands on which said station is located were property of the United States at the time of the enactment of said Swamp Land Act, and at the time the said marsh in Indiana, was patented by the United States to the State of Indiana; that complainant's property is not taken or proposed to be taken, by said work of drainage. That complainant, in respect to said stream, has no right which is not subject to be affected to the full extent set forth by complainant by the exertion of the police powers of the State of Indiana; that if complainant will sustain any damage the same will be indirect and consequential, and of the same character as will be sustained by other riparian proprietors along said stream in Illinois. This defendant further says that as against a public work of this character the laws of the State of Indiana extend no remedy to one only secondarily or consequentially damaged, and particularly if the person complaining and his property was beyond the reach of the process of the courts of the State at the time the proceeding establishing such work was had.

And this defendant further answering denies that the complainant is entitled to the relief or any part thereof in said bill of complaint demanded, and prays to be dismissed with his reasonable costs in this behalf most wrongfully sustained.

And defendant further moves the court to dismiss this suit because of insufficiency of fact, arising on the face of the bill of complaint herein, to constitute a valid cause of action in equity.

STEPHEN P. CORBOY,
Drainage Commissioner of the Calumet Ditch, Defendant.

R. W. BURNS,
FRANK B. PATTEE, AND
JOHN H. GILLETT,
Solicitors for Defendant.

34 **Special Findings Filed.**

In the Matter of the CALUMET DITCH.

Special Finding.

The Court having been requested at the proper time to find the facts specially and state its conclusion of law thereon by the remon-

strators, the Lake Shore and Michigan Southern Railway Company, The Chicago, Indiana and Southern Railroad Company, the Michigan Central Railroad Company, does now find the facts to be as follows:

1. Topography of the Little Calumet River.

The Little Calumet River described in the petition and proceedings for the establishment of the ditch has its course in the county of La Porte, near Otis, Indiana, and runs westerly and in a measure parallel with the south shore of Lake Michigan until such river crosses the State line into Illinois; slowing thence westerly for a distance and until in time it runs and empties into the Big Grand Calumet, which last named river empties into Lake Michigan near South Chicago, Illinois. Between the valley of the Little Calumet River and the lake shore in Porter and Lake County, Indiana, there is a high ridge of sandy land averaging about thirty feet above the level of Lake Michigan; and some ten feet above the Calumet Valley. This sand ridge is a little more than one mile in width. There are no tributaries flowing into the said Calumet from the North.

It has on the south a tributary known as Salt Creek, which has its origin near Valparaiso in Porter County and which takes a Northwesterly course to its intersection with the Little Calumet River at a point about four miles west of the west line of Porter County and about two miles south of the south shore of Lake Michigan. Said river has a tributary with its origin near Crown Point, in Lake County, known as Deep River, which intersects the Little Calumet River at a point about four and three-fourths miles west of the Porter County line and about three miles south of the south shore of Lake Michigan. These tributaries have well defined channels with beds and banks, are several miles in length respectively, and seldom, if ever, go dry. The Little Calumet River has several small tributaries and one larger tributary known as the Hart Ditch entering said Little Calumet River from Lake County west of the point where the Main Ditch has its origin. Said Hart Ditch enters the Little Calumet Ditch about two and one-half miles east of the State line. The said Hart Ditch has a bed and banks, is several miles in length and flows continuously and seldom if ever, goes dry. Practically all of the water coming from the tributaries above mentioned, including the Hart Ditch, which empty into the Little Calumet River west of the point where the proposed Main Ditch has its origin will continue to flow down the natural course of said Little Calumet River and discharge their waters into Lake Michigan through said river at South Chicago as heretofore.

All of the water of the Little Calumet River and that of all of those of its tributaries which enter it easterly from the point of the origin of the Main Ditch herein proposed will be carried by said Main Ditch and said Salt Creek Arm entering said Main Ditch, into Lake Michigan and will have as an outlet the outlet of said Main Ditch. The total area of the water shed to be drained by this proposed ditch consists of three hundred and fifty square miles.

2. The Court finds that Susan Clough is one of the petitioners in the above entitled cause and that she was at the time of filing the petition herein, has ever since been and now is the owner of the following described real estate in Lake county, in the State of Indiana, to wit: The South West quarter of the North West quarter of Section twenty (20), Township thirty-six (36) North, Range Eight (8) West.

35 . The Court further finds that the Tolleston Club of Chicago is one of the petitioners herein; that said petitioner was at the time of filing the petition herein, has ever since been and now is the owner of the Northeast quarter of the Southeast quarter of Section Eighteen (18), Township Thirty-six (36) North, Range Eight (8) in Lake County, Indiana.

The Court further finds that Gostlin, Meyn & Company is one of the petitioners herein; that said petitioner was at the time of filing the petition herein, has ever since been and now is the owner of the West one half of Lot Seven (7), excepting therefrom the railroad crossing the same in Section Twenty-four (24), Township thirty-six (36) North, Range Nine (9) West in Lake County, in the State of Indiana.

That said petitioners desire to drain said lands above described; that the drainage of said respective tracts of land cannot be accomplished in the best and cheapest manner, without affecting the lands of others; that said petitioners are the owners respectively of the said separate and distinct tracts of land above described and that the said lands of each of said respective petitioners were at the time said petition was filed, ever since have been and now are situated outside the corporate limits of cities and towns and not within the corporate limits of any city or town in this State; that said petitioners find it necessary to effectuate successful drainage of the said lands above described; that said lands cannot, nor can either or any of said tracts of land, be drained without affecting the lands of others; that each of the above described tracts of lands respectively will be benefited by the drainage herein prayed for and that each of said described tracts of land are assessed with benefits for said drainage; that each of said tracts of land are and were at the time of the filing of the petition and are at present wet and marshy and in need of drainage; that by the construction of said proposed drain each of said described tracts of land will be reclaimed and drained and benefited by this proceeding; which said lands are not and were not when said petition was filed within the corporate limits of any city or town and which said lands are situated in Lake County, Indiana.

3. That the proposed Calumet Ditch consists of a Main Ditch and a branch ditch known as the Salt Creek Arm; that the course of said proposed Main Ditch is described as commencing at a point in Lake Michigan which is 231.4 feet south and 927.3 feet west of the pipe at the Northeast corner of Lot three (3) in Section twenty-five (25), Township Thirty-seven (37) North, Range Seven (7) West in Porter County, Indiana, and thence South Seven (7) degrees Eighteen (18) minutes East 1913.1 feet, thence by a surve of Two (2) degrees to the right 281 feet; thence South One (1) degree Forty-

one (41) minutes East 3092.4 feet, thence by a curve of four (4) degrees to the left 310.7 feet, thence South Fourteen (14) degrees Seventeen (17) minutes East 1102.8 feet, thence by a curve of ten (10) degrees to the right 600 feet, thence South 45 degrees fifty-three (53) minutes West 3600 feet, thence by a curve of Six (6) degrees to the right 200 feet, thence south fifty-seven (57) degrees fifty-three (53) minutes west 2484.7 feet, thence by a curve of Six (6) degrees to the right 192.1 feet, thence South Sixty-nine (69) degrees twenty-five (25) minutes West 6761.8 feet, thence by a curve of fifteen (15) degrees to the left 308 feet, thence South twenty-three (23) degrees Thirteen (13) minutes west 1038.4 feet, thence by a curve of Eleven (11) degrees Nine (9) minutes to the right 377.7 feet, thence south sixty-six (66) degrees thirty-one (31) minutes West 14745.3 feet, thence South Seventy-five (75) degrees Thirty-eight (38) minutes West 4169 feet, thence by a curve of Eight (8) degrees to the left 445 feet, thence South Forty (40) degrees two (2) minutes West 312.5 feet, thence South Twenty-six (26) degrees fifty-two (52) minutes West 2095.9 feet, thence South Eleven (11) degrees Twenty-seven minutes West 49.6 feet, and there terminating in Deep River at a point 1251 feet East and 852 feet North of the Southwest corner of section Thirteen (13), Township Thirty-six (36) North, Range Eight (8), West, in Lake County, Indiana.

36 And the course of said Salt Creek Arm is described as commencing in the Main Ditch as above described at station number sixty-three (63) plus 30.4 feet and thence by a curve of four (4) degrees to the left 1930.7 feet, thence North Eighty-eight degrees Thirty-nine (39) minutes East 5619.3 feet, and there terminating in the Little Calumet River at the mouth of Salt Creek at a point *of* 1230 feet East and 100 feet South of the center of Section Thirty-one (31) Township Thirty-seven (37) North, Range Six (6) West in Porter County, Indiana.

4. Said Calumet Ditch is located in the counties of Porter and Lake in the state of Indiana, 22,300 feet of the length of said ditch is located in Lake County and 29,650 feet of the length of said ditch is located in Porter County, and the greatest length of said proposed ditch is located in Porter County.

5. The Main Ditch will have a bottom width of Seventy feet from station zero (-ts points of outlet) for a distance of one and two tenths miles up stream and bottom width of fifty feet for the remaining distance up stream. The Salt Creek Arm will have a bottom width of fifty feet from its point of intersection with the Main Ditch for a distance of Nine Hundred feet up stream and a bottom width of forty feet for the remaining distance up stream. Said proposed Main Ditch will have side slopes of two feet horizontally to one foot vertically for a distance of one and two tenths miles up stream from the outlet and side slopes of one foot horizontally to one foot vertically for the remaining distance up stream. Said Salt Creek Arm will have side slopes of one foot horizontally to each foot vertically. Said Main Ditch will vary in depth from eleven feet at its starting point to fifty-eight feet at its greatest depth. Said Salt Creek Arm will vary

in depth from ten feet at its shallowest point to twenty-two feet at its deepest point. The grade line of the bottom of the Main Ditch will have a downward slope toward the outlet of one foot perpendicularly to ten thousand feet horizontally. The Salt Creek Arm will have a corresponding slope for bottom grade line for a distance of nine hundred feet. The Salt Creek Arm will bear from a northwesterly course to a northerly course by gentle curve. The main Ditch will take an easterly course down stream from its upper end for a distance about seven and twenty-three hundredths miles and will then curve by a gentle curvature to the North and take a course north for a distance of one and two tenths miles to its outlet into Lake Michigan. The Main Ditch will have a total length of eight and forty-three hundredths miles.

6. Two rows of jetties are to be constructed each starting at a point twenty-five feet inside of the shore line above highwater mark on the south shore of Lake Michigan and extending out into the lake at right angles with the shore line of the lake and parrallel to the line of the proposed drain for a distance of two hundred feet. Said respective rows of jetties are to be an equal distance of forty feet from the center line of the proposed drain produced. Said two rows of jetties are to be at a distance of eighty feet apart. Each row of jetties consists of white oak piling driven side by side so that their edges touch in two rows. The rows to be six feet apart. The piling to be tied together with timber, then the space between the rows to be completely filled with rock. The top of the piling and filling to come to a height of three feet above the surface level of the water in the lake. The space between the rows of jetties to be excavated to grade line of drain. Said jetties will protect the outlet of said drain from becoming filled with gravel and sand.

37 7. At a point nine hundred feet up stream from the point of the outlet of the Salt Creek Arm into the Main Ditch there is to be constructed a dyke on said Salt Creek Arm. Said dyke is provided as aforesaid in order to reduce the fall in said Salt Creek Arm by changing the grade line of bottom of ditch. By the aid of said dyke the water is to be dropped down nine feet from the grade line at crest of dyke to the new grade line nine feet below at floor of dyke. The drain will have a depth of eleven feet at and above the crest of the dyke and a depth of twenty feet just below the crest of the dyke. Said dyke is to be constructed securely with white oak piling and heavy white oak timbers throughout and all connections to be securely fastened. It will have side walls or wings to conduct the water in, through and beyond said dyke, a crest of timbers, for the water to fall over and a floor or apron constructed horizontally below to catch the water as it falls over the crest; also a perpendicular wall facing for space between crest and apron. The bottom grade line of said Salt Creek Arm from the crest of said dyke up to its source is to be elevated to the extent of four feet perpendicularly to ten thousand feet horizontally. Said dyke will serve to reduce the velocity of the water flowing in the channel of said Salt Creek Arm and will prevent excessive washing on the sides and bottom of said channel.

The Court finds that the said jetties and the said dyke above men-

tioned are to be constructed of substantial and durable materia-; that the timbered parts of said dyke are to consist of white oak timbers of the best grade and white oak piling of the best grade and suitable size; that said timbers that tie said structure together are heavy and durable and to be of the best grade of white oak; that said dyke will remain permanently as part of the construction work of said system of drainage; that the piling to be used in said jetties are to make them secure and durable and the cross timbers and ties and fastenings are to be of heavy white oak timber of the best grade; that said dyke and jetties are each respectively to be fastened in numerous places with substantial bolts so as to hold the same together and in position securely; that the greater part of said structure will be submerged and under water; that the jetties are to be completely filled with broken stone to a height of three feet above the surface of the lake.

8. The Little Calumet River from the point where it is intersected by Salt Creek on west to its outlet has a moderate fall. The distance from the point of intersection of the Salt Creek tributary following the stream to its outlet is fifty-four miles and the total fall between said intersection and its outlet is 19.5 feet. Said river from a point two and one half miles or more above the outlet of said Salt Creek, on down stream to its outlet, at South Chicago, has a definite channel and can be readily traced. It varies in width but has an average width of from sixty to ninety feet. Its depth also varies and ranges from only a few inches in depth below the surface of the marsh at some parts of its course to depths of four feet or more at other places in its course. It has natural curves at frequent intervals throughout its course. There are some places where it is partially obstructed by washed material, piling of bridges and willows, etc. The capacity of said river is too small for the volume of water supplied by its water shed. The fall is also so slight as to make it a slow and sluggish stream. At times of heavy rains and freshets and at times when snow is melted in large quantities the river overflows its banks and the said overflow waters spread out in wide sheets over the marsh hereinafter described. Said overflow sometimes reach- a width of a mile to a mile and a half in the widest places along the course of said river in Lake County, and a half mile or more in Porter County.

38 9. There is a marsh which begins two and one half miles or more east of the intersection of said Salt Creek with the Little Calumet River which said marsh extends thence in a westerly course following the line of the Little Calumet River westerly and crossing that part of Porter County westerly from said starting point of said marsh and continuing on westward crossing Lake County. Said marsh has a width ranging from one half mile to one and a half miles throughout its course as above described. The lands comprising said marsh become wet at various times of the year and are unfit for cultivation because of excessive moisture due to the overflow of said Little Calumet River and its tributaries and the lack of said Little Calumet River to drain and carry off the surplus waters during the rainy months and seasons of the year and said lands are thereby

rendered wet, cold and unfit for cultivation and uninhabitable. There are fourteen thousand acres of said lands contained in said marsh. Said lands need drainage. By the construction of the proposed drain said land will be drained and reclaimed so that the great portion can be farmed and cultivated. There are numerous highways crossing said marsh which are *set* and at times unfit for travel or use by the public because of their wet and overflowed condition. By the construction of said proposed drain said highways will be drained so that their maintenance for public travel will be less expensive and their use for public travel will be uninterrupted by overflows. There are numerous railway lines, other than those herein specifically mentioned, crossing said marsh and the Little Calumet River; that the road beds are raised several feet above the surface level of said marsh; that in times of high water the grades and road beds of some of said railroad lines become wet and saturated with water; that it weakens said road beds; that makes the cost of maintenance more expensive. By the construction of said proposed drain said railway grades and roadbeds will be drained and thereby made more safe for the movement of trains and less expensive to maintain. Very many years ago the Lake Shore and Michigan Southern Railroad was constructed and is now operated and maintained under the general laws of Indiana -long on the said ridge of high land between the said river and the l ake Michigan and through the counties of Lake and Porter. The last named railroad uses a double track railroad system between Chicago and the city of Cleveland, Ohio, and forms a part of what is known as the New York Central Lines or system. The Chicago, Indiana & Southern Railroad Company also owns and maintains a single track railroad line upon said ridge and near to and approximately parallel to the Lake Shore Railroad.

10. By the construction of said Main Ditch and Salt Creek Arm the waters flowing down the Little Calumet River from the East and the waters of said Salt Creek will enter said Salt Creek Arm at the point designated as the source of said Salt Creek Arm and be thence carried along the course of said Salt Creek Arm to its outlet into the Main Ditch and thence down the main Ditch into the Lake thereby securing an outlet into Lake Michigan. That by the construction of said Main Ditch at its starting point said waters will be carried thence down said Main Ditch and into Lake Michigan through the outlet of the Main Ditch.

39 11. The Court finds that it will be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits; that the aggregate benefits of said proposed drainage will exceed the aggregate costs, damages and expenses of accomplishing said proposed drainage. That the costs, damages, and expenses of such drainage will be less than the benefits, which will result to the owners of the lands which will be benefited thereby. That the total estimated cost for the construction of the drainage herein including all damages allowed by the commissioners and approved by the court is 314,398.98 Dollars; that the total benefits assessed are 335,264.69 Dollars.

12. That the proposed work will improve the public health.

13. That the proposed work and drainage will benefit public highways in Calumet Township and North Township; also a public highway in the town of East Gary and public highways and streets in the city of Gary, in Lake County; also public highways in Portage Township, and a public highway in Westchester township, in Porter County, Indiana.

14. That the proposed work and drainage will be of public utility.

15. That the proposed work as decided upon and reported by the Commissioners of Drainage will be sufficient to properly drain the lands and easements to be affected.

16. The Court finds that the Chicago, Indiana and Southern Railroad Company is a steam railroad Company duly organized and existing under the general laws of the state of Indiana providing for the incorporation of steam railways and has been such continuously since the date of filing the petition herein, and was such railroad company on said date; that said company at the time of filing the petition herein owned and has ever since owned and does now own its right of way which is 100 feet in width and which crosses Section Thirty-six, (36), Township Thirty-seven North, Range Seven (7) West, in Porter County, Indiana, and which extends in an east and west direction; that by the report of said Drainage Commissioners said Company was awarded damages in the sum of $17,000.00 to its said right of way in said Section, township and range aforesaid.

The court finds that the Main channel of the proposed ditch will intersect said right of way within said section aforesaid at approximately right angles to the line of said company's right of way and that said intersection will be made at a point near station thirty-seven (37), which point is between station zero and station sixty-three plus thirty of the line of said Main channel of said ditch; that at the point of said intersection the specifications provide that bridges of railroads and railways may be built upon piers to be constructed in the side slopes of said channel, but not closer than forty-three feet on either side from the center line of the channel measuring along the bottom of the channel; that the piers for a bridge crossing said channel when so constructed can be set agreeably to the specifications in said report at a distance of eighty-six feet in the clear from each other; that the distance from the grade line of the bottom of the channel of said proposed ditch to the top of the rails of the railroad track of said company at said point is 30-75/100 feet; that said railroad company has a single track and two switch tracks with two switches for the same at the point in said section where its right of way crosses the channel of said proposed ditch; but that said switch tracks do not cross the channel of the proposed ditch, but that the points where both switches are come within the channel of said ditch; that at the point where the channel of said proposed ditch intersects the right of way of said railroad company there is not now and never has been any ditch drain or water course; that said railroad company is and

40 was at the time said petition was filed engaged in carrying freight and passengers for hire over its said right of way crossing said section from points both east and west of the point of its intersection with the channel of the proposed ditch; that said railroad company has no other property other than its said right of way that is in any manner affected or interfered with or touched by said drainage proceedings herein; that said Chicago, Indiana & Southern Railroad Company will not be damaged by the construction of said proposed drain.

17. The Court finds that the Lake Shore and Michigan Southern Railway Company is a steam railroad company duly organized and existing under the general laws of the State of Indiana providing for the incorporation of steam railways and has been such continuously since the date of filing the petition herein and was such railroad company on said date; that said company at the time of filing said petition owned, has ever since owned and still owns a right of way for its railway line which is 100 feet in width; that said right of way crosses Section thirty-six (36) Township thirty-seven (37) North, Range Seven (7) West in Porter County Indiana in an east and west direction; that by the report of said drainage commissioners said company was awarded damages in the sum of $35,000.00 to its said right of way in said section, township and range aforesaid.

The Court finds that the main channel of the proposed ditch will intersect said right of way within said section aforesaid at approximately right angles to the line of said company's right of way; that said intersections will be made at a point near station Forty-seven (47), which said point is between station zero and station sixty-three plus thirty of the line of said main channel of said ditch; that at the point of said intersection the specifications provide that bridges of railroads and railways may be built upon piers to be constructed in the side slopes of said channel but not closer than forty-three feet on either side from the center line of the channel, measuring along the bottom of the channel; that the piers for bridges crossing said channel when so constructed can be set agreeably to the specifications in said report at a distance of eighty-six feet in the clear from each other; that the distance from the grade line of the bottom of the channel of said proposed ditch to the top of the rails of the railroad track of said company at said point is thirty-four feet; that said railroad company has a double track at the point where its right of way crosses the channel of said proposed ditch; that at the point where said intersection is made the surface level of the country is twenty-five to thirty feet above the surface level of the water in Lake Michigan; that at the point where the Little Calumet River enters the main channel of said proposed drain the surface level of the water in said river is about nineteen feet higher than the surface level of the water in Lake Michigan; that at the point where the channel of said proposed ditch intersects the right of way of said railroad company there is not now and never has been any ditch, drain or water course; that said railroad company is a common carrier

of freight and passengers and is engaged in carrying freight and passengers for hire over its said right of way crossing said section above described from points both east and west of the point of its intersection with the channel of the proposed ditch; that said railroad company has no other property other than its said right of way that is in any manner affected or interfered with or touched by said drainage proceeding herein; that said Lake Shore and Michigan Southern Railway Company will not be damaged by the construction of said proposed drain.

41 18. The Court further finds that at the point where the ditch passes under the bridge of the Michigan Central Railroad Company the natural channel of the stream spanned by the present bridge will have to be deepened about seven or eight feet, which will necessitate the re-building of the abutments and piers upon which the bridge rests.

The Court also finds that the defendant, Michigan Central Railroad Company, will neither be damaged or benefited by the proposed drain.

19. The Court finds that the Chicago, Indiana and Southern Railroad Company, the Michigan Central Railroad Company and the Lake Shore and Michigan Southern Railway Company or either of them own no property affected by the proposed drainage than heretofore mentioned in the previous findings.

20. The Court finds that the right of way described in the Commissioners' Report in Sections Sixteen (16) and Twenty-one (21) Township thirty-six (36) North, Range nine (9) West, in Lake County and the following real estate in Lake County, described as follows; East four chains of the Southwest quarter of the Northwest quarter of Section twenty-one (21) Township thirty-six (36) North, Range Nine West, as the property of the Indiana Harbor Railroad Company and is now owned by the Indiana and Southern Railroad Company, and that neither said right of way or parcel of real estate above described will be benefitted by the construction of the proposed drainage.

Dated this 21st day of March, 1911.

(Signed) HENRY A. STEIS,
Special Judge of the Porter Circuit Court of Porter County.

Conclusion of Law.

Upon the foregoing facts, the Court concludes the law to be as follows:

1st. That the Chicago, Indiana and Southern Railroad Company should not be charged with any benefits by reason of the construction of the proposed work either as to its right of way or the parcel of land described as the East four chains of the Southwest quarter of the Northwest quarter of Section twenty-one (21), Township Thirty-six (36) North, Range Nine (9) West, in Lake County, Indiana; and that said Company is not entitled to recover any damages by reason of the construction of the proposed work.

2nd. That the Michigan Central Railroad Company should not be charged with any benefits by reason of the construction of the proposed work, nor is it entitled to recover any damages.

3rd. That the Lake Shore and Michigan Southern Railway Company is not entitled to recover any damages by reason of the construction of the proposed work.

4th. That the proposed work is of public utility and should be established and constructed.

Dated March 21, 1911.

(Signed) HENRY A. STEIS,
Special Judge of the Porter Circuit Court of Porter County, Indiana.

42 And afterwards, to-wit: At the May Term of said Court, on the 29th day of June, 1917, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

This cause coming on now to be heard by the court upon the motion of the defendant for a dismissal of the bill of complaint, and said motion being argued by counsel, and submitted for the consideration of the court, and it appearing to the court that the relief prayed in the bill of complaint is not allowable under the provisions of section 265 of the Judicial Code of the United States,

It is now ordered, adjudged and decreed by the court that said motion be and the same is hereby sustained.

And it is further and finally ordered, adjudged and decreed by the court that the bill of complaint be and the same is hereby dismissed for want of jurisdiction at the costs of the complainant.

And afterwards, to-wit: At the May Term of said Court, on the 1st day of August, 1917, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the Public Service Company of Northern Illinois, the plaintiff in the above entitled cause, and files with the Clerk of said Court its assignment of errors in said cause, which assignment of errors reads as follows:

Assignment of Errors.

The plaintiff in the above entitled cause says there is manifest error in the proceedings and judgment entered in said cause on the 29th day of June, 1917, and assigns the following as the errors upon which it will rely upon the prosecution of the appeal in said cause:

1. That the United States District Court for the District of Indiana, erred in sustaining the motion of defendant to dismiss the Bill of Complaint in said cause.

2. That the United States District Court for the District of Indiana erred in dismissing the Bill of Complaint in said cause.

43 3. That the United States District Court for the District of Indiana erred in adjudging and decreeing the dismissal of the Bill of Complaint for want of jurisdiction in said cause.

Wherefore, said Public Service Company of Northern Illinois prays that said order and decree be reversed and said District Court for the District of Indiana be ordered to overrule said motion to dismiss said Bill of Complaint.

ISHAM, LINCOLN & BEALE,
SMITH, REMSTER, HORNBROOK & SMITH,
Solicitors for Plaintiff, Public Service Company of Northern Illinois.

And said plaintiff also presents to the court its petition which was this day filed with the Clerk of said Court, praying for the allowance of an appeal to the Supreme Court of the United States from the final order, judgment and decree made and entered in said cause on the 29th day of June, 1917, wherein it was adjudged that the bill of complaint therein be dismissed for want of jurisdiction, which petition reads as follows:

Petition for Appeal.

The above named plaintiff, Public Service Company of Northern Illinois, feeling aggrieved by the final order, judgment and decree entered in the above entitled cause on the 29th day of June, 1917, dismissing the Bill of Complaint therein for want of jurisdiction, does hereby appeal from said final order, judgment and decree, to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and it prays that this, its appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said order, judgment and decree *was* made and rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal, be made.

ISHAM, LINCOLN & BEALE.
SMITH, REMSTER, HORNBROOK & SMITH.

44 And upon a consideration by the court of said petition, the same is hereby granted and allowed and it is ordered that a duly certified copy of the record, papers and entries and all proceedings thereunder be transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal in said cause be fixed at the sum of $500, with good and sufficient surety to be approved by this Court.

And said plaintiff now presents to the court its bond executed to the defendant in the sum of $500, with the United States Fidelity & Guaranty Company as surety thereon, which bond is now approved

by the court both as to form and the security thereof and which bond with said approval endorsed thereon reads as follows:—

Know all men by these presents, That we, Public Service Company of Northern Illinois, as principal, of Cook County, in the State of Illinois, and United States Fidelity and Guaranty Company, as surety, of the County of Marion and State of Indiana, are held and firmly bound unto Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, in the sum of Five Hundred Dollars ($500.) lawful money of the United States, to be paid to him and his successor or successors; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 26th day of July, 1917.

Whereas, the above named Public Service Company of Northern Illinois has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the District of Indiana, in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the plaintiff named, Public Service Company of Northern Illinois, shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

45 In witness whereof, said Public Service Company of Northern Illinois, and said United States Fidelity and Guaranty Company have caused this instrument to be signed by their respective officers, duly authorized, and their respective corporate seals to be hereunto affixed.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
By FRANK J. BAKER,
Vice-President.

Attest:
[SEAL.] P. D. SEXTON,
Secretary.

[SEAL.] UNITED STATES FIDELITY & GUARANTY CO., BALTIMORE, MD.,
By JOHN E. MESSICK,
Attorney-in-fact.

Indianapolis Form 6.

STATE OF INDIANA,
Marion County, ss:

Before me, a Notary Public in and for said County and State, personally appeared John E. Messick, who being by me duly sworn upon his oath did depose and say that he is the Attorney-in-fact of

the said United States Fidelity and Guaranty Company, of Baltimore, Maryland; that he knows the corporate seal thereof; and that the seal affixed to the within bond is such seal;

That the said John E. Messick signed the bond as Attorney-in-fact of said Company in accordance with a resolution, passed at a meeting called and held by the Board of Directors of the said United States Fidelity and Guaranty Company, at its Home Office in Baltimore, Maryland, under date of February the 29th, 1904.

Witness my hand and Notarial Seal this 26th day of July, 1917.

[SEAL.] LOUIS W. WITTE,
Notary Public.

My commission expires August 7th, 1918.

46 STATE OF ILLINOIS,
County of Cook, ss:

Be it remembered, that on this 26th day of July, 1917, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Paul D. Sexton, Secretary of the Public Service Company of Northern Illinois, the corporation mentioned in the foregoing bond, and executed such bond as such Secretary for and on behalf of such corporation; and on being duly sworn on his oath says that he is such Secretary and that the seal affixed to said bond is the corporate seal of such corporation, the same being well known to him; that Frank J. Baker is Vice-President of the Public Service Company of Northern Illinois and signed said bond and affixed said seal thereto, and that the same was executed and delivered by authority of the Board of Directors of said Public Service Company of Northern Illinois.

In witness whereof, I have hereunto set my hand and seal this 26th day of July, 1917.

WILLIAM A. BLIND,
Notary Public.

My commission expires, March 10, 1920.

This bond is approved both as to sufficiency of security and form this 1st day of August, 1917.

ALBERT B. ANDERSON,
United States Judge.

And said plaintiff now presents to the court its certificate that in said cause the jurisdiction of said court is in issue and that such question is the only question of law for decision of the Supreme Court of the United States.

Now upon said consideration said certificate is granted, which certificate is now filed and reads as follows:

Certificate.

The District Court of the United States for the District of Indiana hereby certifies to the Supreme Court of the United States that on the 29th day of June, 1917, upon motion of the defendant, a decree was entered in the above entitled cause dismissing for want of jurisdiction the bill of complaint of the complainant on the ground that it appeared to the Court that the relief prayed in the bill of complaint was not allowable under the provisions of Section 265 of the Judicial Code of the United States. A copy of such bill of complaint and motion is contained in the judgment roll filed herein to which reference is had for a more particular description thereof.

47 And this Court further certifies that in said cause the jurisdiction of this Court is in issue, and further certifies to the Supreme Court of the United States said question of jurisdiction raised by said motion to dismiss said bill of complaint on the grounds aforesaid, namely, the question whether the District Court of the United States has jurisdiction, in view of the provisions of Section 265 of the Judicial Code of the United States, to enjoin a Drainage Commissioner, appointed by the Circuit Court of Porter County in the State of Indiana in a drainage proceeding instituted under the drainage laws of said State, from constructing in Indiana a drainage ditch which would so divert from its natural course the flow of water in a river arising in and flowing from the State of Indiana into the State of Illinois, that irreparable injury and damage would be sustained by a riparian owner of land situated on said river in the State of Illinois, which was lawfully using the waters of such river, such owner not having been made a party to said drainage proceedings in the Circuit Court of Porter County.

And this court further certifies that said question of jurisdiction is the only question of law upon the pleading and process for the decision of the Supreme Court of the United States, and that this certificate is granted at the term in which the judgment in this cause was entered.

Dated, Indianapolis, August 1st, 1917.

ALBERT B. ANDERSON,
United States Judge.

48 In the District Court of the United States for the District of Indiana.

No. 215.

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS
v.
STEPHEN P. CORBOY, Drainage Commissioner of the Calumet Ditch.

To Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Wash-

ington, in the District of Columbia, thirty days after the date hereof, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the District of Indiana, from a final decree signed, filed and entered on the 29th day of June, 1917, in that certain suit, being in Equity No. 215, wherein the Public Service Company of Northern Illinois is plaintiff and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Hon. Albert B. Anderson, United States District Judge for the District of Indiana, this 1st day of August, 1917.

ALBERT B. ANDERSON,
United States District Judge for the District of Indiana.

49 I acknowledge service and receipt of a copy of the foregoing citation this 6th day of August, 1917.

JOHN H. GILLETT,
Solicitor for Defendant and Appellee, Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch.

And afterwards, to-wit: At the May Term of said Court, on the 8th day of August, 1917, in Recess, the following further proceedings in the above entitled cause were had, to-wit:

Præcipe for Record on Appeal of Public Service Company of Northern Illinois.

To the Clerk of the District Court of the United States for the District of Indiana:

You are requested to prepare and certify for the record on the appeal of the Public Service Company of Northern Illinois to the Supreme Court of the United States, a full and complete
50 transcript of the proceedings, entries and record in the above entitled cause, the same being as follows, towit:

1. The Bill of complaint filed in said cause and the entries in connection with the filing thereof.

2. The issue of process or subpœna in said cause, together with the return of the United States Marshal endorsed thereon.

3. The defendant's answer to the bill of complaint with motion to dismiss the bill of complaint, filed April 23rd, 1917, together with the entries of filing the same.

4. The entry of submission and hearing on the last named motion to dismiss the bill of complaint.

5. Judgment of the court dismissing the bill of complaint under date of June 29th, 1917.

6. Certificate of the Judge of the Court to the Supreme Court of the United States that the jurisdiction of the District Court is involved and that it is the only question involved.
7. Petition for appeal by the Public Service Company of Northern Illinois and entry thereon allowing the same and fixing the amount of the bond for appeal.
8. Assignment of errors of the Public Service Company of Northern Illinois filed with its petition for appeal.
9. Appeal bond of the Public Service Company of Northern Illinois and approval thereof by the Judge of said Court.
10. Citation of the Public Service Company of Northern Illinois to the defendant and the acknowledgment of the service thereof by his solicitors.
11. This precipe for record and acknowledgment of the service thereof, together with a copy, by the Solicitors of defendant.
12. Clerk's certificate.

ISHAM, LINCOLN & BEALE,
SMITH, REMSTER, HORNBROOK & SMITH,
Solicitors for Public Service Company of Northern Illinois.

I acknowledge service and a copy of this precipe, this 6th day of August, 1917.

JOHN H. GILLETT,
Solicitors for Defendant, Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch.

51 In the District Court of the United States for the District of Indiana.

I, Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in said Court, as required by the præcipe herein, in the cause of Public Service Company of Northern Illinois, v. Stephen P. Corboy, Drainage Commissioner of the Calumet Ditch, No. 215, in Equity, as the same appears of record in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said District, this 22" day of August, 1917.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: File No. 26,119. Indiana D. C. U. S. Term No. 652. Public Service Company of Northern Illinois, appellant, vs. Stephen B. Corboy, Drainage Commissioner of the Calumet Ditch. Filed August 29th, 1917. File No. 26,119.

20

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF AND ARGUMENT FOR APPELLANT

TOGETHER WITH AN APPENDIX CONTAINING, FOR CONVENIENCE OF REFERENCE, CERTAIN STATUTES AND QUOTATIONS FROM DECISIONS.

CHARLES W. SMITH,
BUELL MCKEEVER,
GILBERT E. PORTER,
WILLIAM G. BEALE,
Counsel for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.
(26,119)

SUBJECT INDEX.

LIST OF CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

STATEMENT OF THE CASE.

QUESTION INVOLVED.

The sole question presented in this case is one of federal jurisdiction.

Has a citizen of one state, whose business and property are located within that state upon an interstate stream, no remedy in a federal court against an invasion of his property rights in that state resulting from the diversion in an adjoining state of the waters of such stream from their normal flow to an entirely different course by means of a drainage ditch to be constructed in the adjoin-

ing state pursuant to proceedings of a state court of such adjoining state to which proceedings he is not a party?

In other words, does Section 265 of the Judicial Code of the United States prevent Appellant, an Illinois citizen, whose property and business are located in that State upon the Little Calumet River, from obtaining relief by injunction in a federal court from the construction of a drainage ditch in Indiana by Appellee, an Indiana Drainage Commissioner appointed by the Circuit Court of Porter County in a proceeding to which Appellant was not a party, the operation of which ditch will divert in a wholly different direction in Indiana the flow of water in the Little Calumet River and will irreparably damage Appellant's property in Illinois?

The question is raised upon an appeal by Appellant from a decree of the District Court of the United States for the District of Indiana, dismissing upon motion of Appellee, for want of jurisdiction, Appellant's bill of complaint on the ground that it appeared to the court that the relief prayed in the bill was not allowable under the provisions of Section 265 of the Judicial Code of the United States. (Trans., 42.) In his certificate, Anderson, District Judge, stated the question as follows (Trans., 47):

> "whether the District Court of the United States has jurisdiction, in view of the provisions of Section 265 of the Judicial Code of the United States, to enjoin a Drainage Commissioner, appointed by the Circuit Court of Porter County in the State of Indiana in a drainage proceeding instituted under the drainage laws of said State, from constructing in Indiana a drainage ditch which would so divert from its natural course the flow of water in a river arising in and flowing from the State of Indiana into the State of Illinois, that irreparable injury and damage would be sustained by a riparian owner of land situated on said river in the State of Illinois, which was lawfully using the waters of such river, such owner not having been made a party to said

drainage proceedings in the Circuit Court of Porter County."

Statement of Facts.

The facts alleged in the bill of complaint are as follows:

Appellant is a public utility corporation organized under the laws of the State of Illinois and a citizen of that State, and is engaged in the business of producing, selling and distributing electrical energy, gas and steam in Illinois. One of its electrical generating stations is located upon land owned by it upon the Little Calumet River near Blue Island, in Cook County, Illinois, and is operated by steam power. The land so owned extends underneath and to the center of the river. As a riparian owner Appellant is entitled, under the law of Illinois, to the use of the water in the river for the operation of its plant. (Trans., 2-6.)

It is absolutely essential for the efficient and economical operation of this station that the existing velocity of flow and volume of water in the river at the station continue as at present in order that a sufficient quantity of water for cooling purposes may be available. If the velocity of flow and volume of water in the river should be materially lessened, the usefulness of the water in the river for cooling purposes will be destroyed. (Trans., 7-8.)

The Little Calumet River rises in Laporte County, Indiana, and flows westerly across Porter and Lake Counties into Cook County, Illinois, where it passes the station and then joins the Grand Calumet River, which flows into Lake Michigan at South Chicago, Illinois. The river affords the only sufficient supply of water in the locality in which the station is located for the operation of a large, modern, steam-driven, electrical power station with suitable railroad connections. (Trans., 9-10.)

During the October term, 1908, there was instituted in the Circuit Court of Porter County, Indiana, under the Drainage Act passed by the Legislature of Indiana on March 11, 1907, a proceeding to establish and construct in that county a ditch to extend from the Little Calumet River in a northerly direction to Lake Michigan. A final decree was entered in that proceeding on March 22, 1911, ordering that the ditch be established and constructed. Thereafter, on April 21, 1914, upon appeal to the Supreme Court of Indiana, the decree was affirmed, and thereafter, on January 8, 1917, upon writ of error to the Supreme Court of the State of Indiana, the judgment of that court was affirmed by this Court. Appellant is not now and never has been a party to that proceeding. (Trans., 10-11.) The decision of the Supreme Court of Indiana is reported in 182 Ind., 178; 104 N. E., 975, and upon rehearing in 182 Ind., 178; 105 N. E., 905 and the decision of this Court is reported in 242 U. S., 375.

More than one-half of the volume of water normally and naturally flowing down the Little Calumet River by Appellant's station will be diverted into the proposed ditch, which will result in reducing by more than one-half the generating capacity of the station during the dry season of the year. In such event the supplying of electrical energy by Appellant from its station will be greatly restricted and Appellant will thereby sustain great and irreparable injury largely exceeding $3,000 in amount. (Trans., 12-13.)

Under the decree establishing the ditch, Appellee, who is a citizen of the State of Indiana and a resident of Porter County, was appointed Commissioner for the construction of the ditch, and is now acting as such Commissioner, and proposes to proceed with the construction and completion of the ditch. No portion of the ditch has yet been constructed. (Trans., 13.)

Appellant alleged that the construction and main-

tenance of this ditch and the alteration and diversion thereby of the flow of water in the river, and the decree of the Circuit Court of Porter County authorizing such construction and maintenance of the ditch and such alteration and diversion of the flow of water in the river, and the Drainage Act itself to the extent that it authorizes such construction and maintenance of the ditch and such alteration and diversion of the flow of water in the river, all deprived Appellant of its property without due process of law and were in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, and for that reason were illegal and void. (Trans., 14.)

Appellant prayed that an injunction be issued restraining Appellee from constructing and maintaining the ditch. (Trans., 16.)

Attached to the bill of complaint is a blue print showing the drainage area affected by the proposed ditch. (Trans., 17.)

Appellee filed an answer raising issues of fact and in conclusion moved to dismiss the bill for want of equity. (Trans., 33.) Without passing upon the merits of the bill, the District Court dismissed the bill for want of jurisdiction. (Trans., 42.)

In an indexed Appendix immediately following the argument will be found a synopsis of the Drainage Act of 1907, under which this proceeding was instituted, quotations from decisions and the Drainage Act in full, to which reference will be made in the course of the argument. The Act will be found in the Indiana Acts of 1907, pages 502-537.

Specification of Error.

Appellant specified as error the action of the District Court in adjudging and decreeing the dismissal of Appellant's bill for want of jurisdiction as certified by the district judge. (Trans., 43.)

POINTS.

I.

The sole question for the consideration of this Court is one of jurisdiction.

Sec. 238 of the Judicial Code (U. S. Compiled Statutes, 1916, Vol. 2, Sec. 1215).

Mexican Central Ry. Co. v. *Eckman*, 187 U. S., 429, 432.

Venner v. *Great Northern Ry. Co.*, 209 U. S., 24, 30.

Simon v. *Southern Ry. Co.*, 236 U. S., 115, 121.

II.

The construction of the Burns ditch, whether such construction be considered an act of the Circuit Court of Porter County or an act of the Drainage Commissioner as an agent of the State, is not a *judicial proceeding* within the meaning of Section 265, but is merely a legislative, executive or administrative act, and as such may be enjoined by a federal court.

The distinction between proceedings judicial and proceedings legislative, executive or administrative, although taking place in a body, which in its principal aspect is a court, has been repeatedly recognized by this Court in construing Section 265 of the Judicial Code. Proceedings which are legislative, executive or administrative in character, although taken in a State court, may be enjoined by a federal court.

Prentis v. *Atlantic Coast Line*, 211 U. S., 210, 225-7.

Mississippi Railroad Commission v. *Illinois Central Railroad Co.*, 203 U. S., 335, 341.

Louisville & Nashville R. R. Co. v. *Garrett*, 231 U. S., 298.

Southern Ry. Co. v. *Greensboro Ice & Coal Co.*, 134 Fed., 82, 94; affirmed in *McNeill* v. *Southern Ry. Co.*, 202 U. S., 543.

Crapo v. *Hazelgreen*, 93 Fed., 316.

Delaware, Lackawanna & Western R. R. Co. v. *Stevens*, 172 Fed., 595, 608-10.

Western Union Telegraph Co. v. *Myatt*, 98 Fed., 335, 342, 346-7, 355, 360-1.

Weil v. *Calhoun*, 25 Fed., 865, 870-1.

III.

After the entry of the final decree of the State court establishing the ditch, confirming the assessments and assigning the construction of the ditch to a drainage commissioner, the proceedings passed beyond the control of the original petitioning landowners, who thereafter had no right or authority either to dismiss the petition or abandon the proposed improvements. *Appellee then stood for and represented such landowners.* Any collateral attack thereafter upon the ditch proceeding may not be brought against the original petitioners but must be brought against such commissioner.

Board of Commissioners v. *Jarnecke*, 164 Ind., 658; 74 N. E., 520.

Furness v. *Brummitt*, 48 Ind. App., 442; 95 N. E., 1114.

Carter v. *Buller*, 159 Ind., 52; 64 N. E., 667.

The drainage proceeding was in fact a suit of a private character for the special benefit of the owners of the

lands proposed to be drained who are now represented by Appellee. Although Appellant because of the State practice may not directly enjoin such owners from obtaining the benefit of the decree establishing the ditch, nevertheless, it should not for that reason be deprived of all relief in a federal court. Since Appellee stood for and represented the owners of the lands proposed to be drained, Appellant's bill against him was in substance and effect merely a bill *to enjoin him from obtaining for such owners* the benefit of a decree affecting the property of Appellant, which was void as against Appellant for want of jurisdiction, and the District Court should have retained jurisdiction of the bill.

Simon v. *Southern Ry. Co.*, 236 U. S., 115.

Hunt v. *New York Cotton Exchange*, 205 U. S., 322.

Colorado-Eastern Ry. Co. v. *Chicago, Burlington & Quincy Ry. Co.*, 141 Fed., 898.

Marshall v. *Holmes*, 141 U. S., 589, 596-600.

Smyth v. *Ames*, 169 U. S., 466, 516.

Arrowsmith v. *Gleason*, 129 U. S., 86, 98-101.

ARGUMENT.

Point I.

Under Section 238 of the Judicial Code and the decisions of this Court above cited, the only issue presented in this case is one of jurisdiction,—whether a federal court has jurisdiction to enjoin a drainage commissioner appointed by a State court under the Indiana Drainage Act from constructing a drainage ditch, the operation of which would cause irreparable injury and damage to the property of a citizen of another State located outside of the State of Indiana who was not a party to the drainage proceeding.

The question of jurisdiction must be determined by considering the allegations of the bill.

Simon v. *Southern Ry. Co.*, 236 U. S., 115, 121.

Point II.

Section 265 of the Judicial Code of the United States (Section 720 prior to the code revision of 1911) reads as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Appellant contends that the construction of the Burns Ditch is not a *judicial proceeding* within the meaning of the foregoing Section, but is merely a legislative, executive or administrative act even though performed by a State Court, and as such should have been enjoined by the District Court.

Irrespective of any statute the act of constructing the Burns Ditch is in no sense judicial. Such an act alters existing conditions and creates new ones. The flow of water in its natural course down the Little Calumet River will be diverted in an entirely different direction, and the lawful uses of such flow and of the water itself by riparian owners along the river will be taken away. It cannot be denied that the act of constructing this ditch completely changes existing conditions in many respects. Is the act of constructing the ditch in the slightest degree *judicial in nature?* Are any of the elements of a *judicial proceeding* to be found in the performance of this act? In our view the answer to all these questions must be in the negative. The act is distinctively a legislative, executive or administrative act of a representative of the State whether such representative be the Drainage Commissioner or the Circuit Court of Porter County.

We submit to the Court in the Appendix, pages 29-36 a brief analysis of the Indiana Drainage Act of 1907, under which the proceeding establishing the Burns Ditch was instituted. The Act is printed in full in the Appendix, pages 53-84. That analysis discloses that the machinery provided for drainage proceedings is primarily legislative and executive or administrative. The preliminary steps are taken by the drainage commissioners; then follow the judicial proceedings determining the rights of parties who will be benefited or affected by the operation of the ditch; then follows the decree establishing the ditch, and then follow the various acts of the construction commissioner who collects the assessments and performs and pays for the work. The first and third of these steps are legislative in character. The fourth is distinctly executive or administrative in character. The only step in the whole drainage proceeding which can be

said to be judicial in nature is that in which the court adjudicates the rights of the parties who will be affected by the proposed ditch. That step involves the bringing in of all parties interested, the ascertainment of the amount which each property owner should receive as compensation for lands and rights taken, and the proportionate share of the total cost which each property owner should bear. It relates to matters in which antagonistic interests are involved and upon which a judicial determination is necessary. It involves acts peculiarly judicial in character such as are properly within the jurisdiction of a court. But the judicial feature of the drainage proceeding ends as soon as the decree establishing the ditch is entered.

In *Perkins* v. *Haywood*, 132 Ind., 95, 31 N. E., 670, the Supreme Court of Indiana had under consideration the Drainage Act of 1881, which was similar in many respects to the act of 1907, and in the course of its opinion the court said:

> "The drainage law, under which these proceedings were had, contemplates that, after judgment has been rendered by the court establishing a ditch and ordering its construction, the case shall still remain upon the docket of the court while the ditch is in process of construction. The ditch commissioner, to whose supervision the work is intrusted, acts throughout under direction of the court. Section 4279, Rev. St. 1881. Only when he reports showing the work done does it finally disappear from the docket. *It does not follow, however, that the entire proceeding is in fieri during all of this time.* The statute contemplates adversary proceeding. Provision is made for bringing before the court all persons interested in or affected by the work. Issues may be formed and tried, as was done in this case. *But the judgment establishing the ditch, and ordering its construction, is a final judgment, which terminates the adversary proceedings.* It is thereafter on the docket only for the purpose of carrying into

effect the judgment actually rendered, and not for any action modifying or changing that judgment. *So far, therefore, as the adversary proceedings are concerned, it is no longer in fieri after the expiration of the term when the judgment was rendered.*" (Italics ours.)

Again in *Wabash Ry. Co.* v. *Todd*, 186 Ind., 72, 113 N. E., 997, involving a construction of the Act of 1907, the Supreme Court said:

"The judgment which established the drain and ordered its construction, was final in character, and terminated the adversary proceedings, but the action thereafter remained on the court docket for the purpose of carrying such judgment into effect, and to that extent, at least, the Circuit Court retained its original jurisdiction over the subject matter (*Perkins* v. *Haywood*, 132 Ind. 95, 99, 31 N. E. 670), and as Appellant voluntarily appeared and filed an answer to the petition herein, there can be no question as to the jurisdiction over the parties."

After the entry of the decree establishing the Burns Ditch an appeal was taken to the Supreme Court of Indiana where the decree was affirmed, and upon writ of error the decree was reviewed and affirmed by this Court. Thereafter the various steps to be taken by the construction commissioner are specifically designated by the statute and are distinctively executive or administrative in character. At the time the bill was filed by Appellant in the District Court there were no *adversary proceedings* pending in the State Court which Appellant sought to enjoin. Whatever steps remained for the completion of the Burns Ditch were executive or administrative in character whether to be performed by the Drainage Commission as an agent of the State, or as an agent of the court, or by the Circuit Court of Porter County itself.

This Court has frequently recognized the distinction between acts of a judicial body which are purely *judicial*

in character, and acts which are *legislative, executive* or *administrative* in character. The question has commonly arisen in cases in which the Court was called upon to construe a statute of a State which conferred upon its courts duties which were not only judicial, but also legislative in character.

In the cases involving these statutes it was contended that Section 265 of the Judicial Code prevented a federal court from enjoining such a State court from performing legislative acts as well as judicial acts. After careful consideration of the subject this Court held that "proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. Sec. 720, no matter what may be the general or dominant character of the body in which they may take place." The Court pointed out the distinction between *judicial* proceedings and *legislative* proceedings. It held that "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." Whether a given act is judicial, or legislative, executive or administrative, depends upon "the nature of the final act."

Among the cases so considered by this Court are:

Prentis v. *Atlantic Coast Line,* 211 U. S., 210.

Mississippi Railroad Commission v. *I. C. Railroad Co.,* 203 U. S., 335.

Louisville & Nashville R. R. Co. v. *Garrett,* 231 U. S., 298.

McNeill v. *Southern Railway Co.,* 202 U. S., 543, affirming *Southern Railway Co.* v. *Greensboro Ice & Coal Co.,* 134 Fed., 82.

For the convenience of the Court we have set forth in the Appendix, pages 36-42, a brief synopsis of these cases with quotations from the opinions, to which the Court may refer if it desires.

The fundamental principle established by this Court, as announced in the foregoing cases, is that "the nature of the final act" must govern in determining whether such act, *by whomsoever performed,* may be enjoined by a federal court. If the nature of that act is *judicial,* the performance of it may not be enjoined by a federal court; but if the nature of that act is *legislative, executive* or *administrative,* the performance of it may be enjoined by a federal court *even though the act is performed by a judicial body.* Section 265 does not prevent a federal court from enjoining an act of a State court *if such act is not judicial in nature.*

The final act to be performed in the case before this Court is the *construction of a ditch.* There is nothing whatever judicial in character in such an act. It is purely and simply a legislative, executive or administrative act, whether performed by a court or by a drainage commissioner named by the court or elected by the people at any election.

While Section 7 of the Drainage Act (Appendix pp. 33 and 34, 70-71) provides that the drainage commissioner shall at all times be under the control and direction of the court and shall obey such directions, any directions so given by the court are not *judicial acts of the court,* nor is the court in giving such directions *acting in a judicial capacity.* The court will be acting solely in an executive or administrative capacity and will be performing executive or administrative acts, unless such directions are in the nature of a judicial determination of some issue arising between the drainage

commissioner and other parties. As was said by the Supreme Court of Indiana in *Terre Haute* v. *Evansville & Terre Haute R. R. Co.*, 149 Ind., 174, 46 N. E., 77:

> "A judicial officer may, by authority of law, perform other than judicial acts; but when performed *they do not become judicial, because they were performed by a judicial officer.*" (Italics ours.)

As a matter of fact the entry of the decree establishing the ditch is in itself not a *judicial act,* but is a *legislative act.* It is the act of the State, through its judicial agency, declaring that the ditch should be constructed. The legislature might have passed an act establishing the ditch without the intervention of the judiciary, and such act would undeniably be a legislative act of the State. Or the State, through its legislature, may delegate to its judiciary the authority to establish the ditch, just as the legislature may delegate to its Railroad Commission authority to establish rates, but the act of the court in establishing the ditch, just as the act of the Railroad Commission in establishing rates, is still a *legislative act,* although performed by a court. As was said by this Court in *Louisville & Nashville R. R. Co.* v. *Garrett, supra: "It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'"* The final act is the construction of the ditch. The nature of the previous inquiry leading up to the construction of the ditch is distinctly legislative. It involves the investigation and report of the Drainage Commissioners, reviewed by the circuit court, resulting finally in a decree establishing the ditch. All these steps, taken together, constitute a *legislative act* of representatives of the State, and in carrying the legislative act into effect the construction commissioner, in constructing the ditch, performs only executive or administrative acts of the State. The State, through its representatives, the Drainage Commissioners and the

court, legislates the ditch into existence, and the State, through its representative, the construction commissioner, builds the ditch. As was said by the Supreme Court of Indiana in *Chicago & Erie R. R. Co.* v. *Ludding-ton,* 175 Ind., 35, 91 N. E., 939:

> "The construction and repair of public ditches, under the laws of the state, like the establishment and improvement of public highways, is a public purpose, is a matter of state concern, and the exercise of a state function."

In the commission rate cases before this Court above cited the railroad commissioners contended that their proceedings in fixing rates were proceedings of *a court created by the legislature,* and could not, therefore, be enjoined by a federal court because of the provisions of Section 720. This Court, however, held that the establishment of a rate was the making of a rule for the future and was, therefore, *an act legislative and not judicial in kind, and that proceedings legislative in nature were not proceedings in a court within the meaning of section* 720, *no matter what may have been the general or dominant character of the body in which they take place.* Whether such proceedings were judicial or legislative, depended *not upon the character of the body,* but upon the *character of the proceedings.* In this case the act of the circuit court in establishing the ditch was as much legislative in character, and the act of Appellee in building the ditch is as much executive and administrative in character, as in the cases before this Court the act of the railroad commissioner in fixing rates was legislative in character.

This is not a case of enjoining a sheriff from executing a decree of a State court. Such a decree adjudicates existing rights of parties and does not change conditions other than perhaps restoring conditions wrong-

fully changed by the defendant in the particular proceeding. This case deals with the creation of new conditions by legislative and executive action. A ditch is to be dug; water is to be diverted into the ditch; physical conditions over wide areas are changed; Appellant is deprived of its use of the flow of the stream past its plant; the State of Indiana, through its executive officer, the drainage commissioner, will deprive Appellant of its property without due process of law. To hold that these acts of Appellee are a *judicial proceeding* and therefore may not be enjoined by a federal court is to give Section 720 a construction never intended by Congress in its enactment, and a construction not recognized by this Court in its decisions above cited. The decree establishing the ditch was not a *judicial act,* it was a *legislative act* creating and providing for new conditions in the future. The act of Appellee in constructing the ditch is merely an *executive or administrative act* carrying into effect the previous *legislative act* establishing the ditch.

Counsel for Appellee may claim that the only relief which can be granted in this case by a federal court will be an injunction restraining the construction of the Burns' Ditch which the State court has ordered Appellee to construct, and that a conflict of authority will thereupon arise. Doubtless the same claim was made in the commission rate cases and notably the case of *Prentis* v. *Atlantic Coast Line.* There the Virginia court, called a railroad commission, had considered the respective claims of shippers and carriers and had finally decreed that a certain rate was reasonable and should thereafter be charged by carriers. That decree was as much a *decree of a court* as is the decree of the Circuit Court of Porter County establishing the Burns

Ditch. Both were the results of investigations of facts and both established new conditions for the future. What did this Court say to the claim of the Virginia commission that *its act in establishing the rate was a judicial proceeding* with which the federal court could not interfere? This Court in substance answered, "Your act, though the act of a court of a State, *is not a judicial act.* It is a legislative act and may, therefore, be enjoined by a federal court." Precisely the same answer should have been given by the court below to Appellee's contention in this case. The act of constructing the Burns Ditch, even though performed by the Circuit Court of Porter County, is not a *judicial act,* but merely an executive or administrative act, and may, therefore, be enjoined by a federal court. Both acts, the act establishing the new rate for the future and the act of constructing the Burns Ditch, create new conditions and alter existing conditions. Neither of those acts is in any sense judicial.

The mere fact that in the course of its investigation the Circuit Court of Porter County determined how much compensation should be paid to a property owner whose property would be affected by the proposed drainage, or how much a property owner would be benefited by the proposed drainage, and what proportion of the cost of the work must be borne by each, does not change in the slightest "the nature of the final act." The *final act* is still the *construction of the ditch,* and the *nature* of that act is *not judicial.*

The Court may be interested in reading an opinion of the Court of Appeals for the Seventh Circuit in the case of *Crapo* v. *Hazelgreen,* 93 Fed., 316, delivered by Woods, Circuit Judge, with whom sat Jenkins and Showalter, Circuit Judges, the latter not participating, however, in the opinion. The issue in

that case, so far as the jurisdictional question is concerned, was identical with the issue in this case. The court held that an injunction should be granted by a federal court to restrain a drainage commissioner from constructing a drainage ditch pursuant to proceedings of a State court of Indiana upon a bill of a landowner whose rights would be affected by the construction of the ditch, but who was not made a party to the drainage proceeding. Section 720 was not specifically referred to in the opinion, but it is hardly to be supposed that the Section was ignored or overlooked by the court in deciding the case.

There is also an interesting discussion of this general subject, and a review of the decisions of this Court by Ray, District Judge, in *Delaware, Lackawanna & Western Railroad Co.* v. *Stevens,* 172 Fed., 595, 607-10, and by Hook, District Judge, in *Western Union Telegraph Co.* v. *Myatt,* 98 Fed., 335, 342, 346-7, 355, 360-1.

Point III.

After the entry of the final decree of the Circuit Court of Porter County establishing the Burns' Ditch and assigning the execution of the construction of the ditch to Appellee, the proceedings passed beyond the control of the original petitioners and they had no right or authority under the law either to dismiss the petition or to abandon the proposed improvement or to control the proceedings in any manner whatsoever. The matter of constructing the ditch was then under the exclusive control and management of Appellee subject to the direction or order of the court. In any independent action to restrain such construction Appellee is the only proper party defendant.

In *Furness* v. *Brummitt*, 48 Ind. App., 442, 95 N. E., 1114, the owner of land affected by a proposed drainage ditch filed a bill to enjoin the commissioner and the original petitioning landowner from constructing the ditch pursuant to a decree of the court establishing such ditch, on the ground that the order was void. Before the hearing complainant dismissed the bill as to the drainage commissioner so that the only defendant was the petitioner in the drainage proceeding. The court held that the complainant, having been a party to the drainage proceeding, should have appealed from the decree establishing the ditch and could not obtain relief in an independent action in equity. In the course of the opinion, however, the court said:

> "Furthermore, the ditch having been established and the commissioner appointed to construct it, *if any independent action could thereafter be maintained to enjoin its construction, the commissioner was the one to be enjoined*, for the case had by such orders passed beyond the control of the petitioners or other parties to the proceeding." (Italics ours.)

In *Board of Commissioners* v. *Jarnecke*, 164 Ind., 658, 74 N. E., 520, the commissioners of Lake County, Indiana, tried to recover a money judgment for costs and expenses arising out of a proceeding instituted by the defendants in the circuit court of that county to establish a public ditch, the construction of which had been enjoined by a federal court. The court held that the appellees who originally instituted the drainage proceedings were not liable to the county for the costs and expenses thereby incurred. In the course of its opinion the court said:

> "After the final order of the court establishing the ditch and confirming the assessments and assigning the execution of the construction to a commissioner, the proceedings *then passed beyond the control of the petitioners, and they had no right or au-*

thority under the law to either dismiss the petition or abandon the proposed improvement. It was then under the control and management of the commissioner, subject to the direction or order of the court. *Crume* v. *Wilson,* 104 Ind. 583, 4 N. E. 169. The proceedings thereafter in contemplation of the statute were to remain upon the docket of the court as an action pending therein until the construction of the ditch was finally completed. * * * As previously stated, it appears that the petitioners, appellees herein, successfully prosecuted the proceedings instituted by them to a point where the court ordered the proposed work to be established, confirmed the assessments, and assigned the construction thereof to a commissioner, *who, when about to carry out the order of the court, was enjoined from further proceedings in the premises by the federal court.*" (Italics ours.)

In *Carter* v. *Buller,* 159 Ind., 52, 64 N. E., 667, certain items of the account of a drainage commissioner were objected to by interested landowners, and in discussing the relation existing between the drainage commissioner and such landowners, the court, speaking of the commissioner, said:

> "He was appointed by the court to execute its order, and nothing more or less. He was the court's instrument *to construct for the landowners,* who were required to pay the cost, such a ditch as they requested and the court had ordered. He had no authority whatever to depart from the specific depths and dimensions prescribed in the report of the locating commissioners. *He stood for the landowners in contracting and in superintending the work,* and it was his plain duty to see that the contractor performed his agreement, and constructed the drain according to the plans and specifications which formed the basis of the contract." (Italics ours.)

From the foregoing cases it will be seen that Appellant could not maintain its bill in the District Court against the original petitioners who instituted the drainage pro-

ceeding. They passed out of the case upon the entry of the decree establishing the ditch, and thereafter they could exercise no control whatever over the proceeding or the construction work. *Appellee thereafter stood for and represented them in all matters pertaining to this ditch.* The drainage proceeding was primarily for the benefit of the landowners whose lands would be drained by the proposed ditch, and the benefits of the decree establishing the ditch were theirs.

This Court has held that a person whose property rights are affected by a decree entered in a proceeding to which he is not a party, may maintain a bill against the persons in whose favor such decree was entered to enjoin them from obtaining the benefits of their decree unlawful as against him.

Simon v. *Southern Ry. Co.,* 236 U. S., 115.
Hunt v. *New York Cotton Exchange,* 205 U. S., 322.

See also:

Arrowsmith v. *Gleason,* 129 U. S., 86, 98-101.
Marshall v. *Holmes,* 141 U. S., 589, 596-600.

We set forth in the Appendix, pages 42-49, a brief synopsis of the two cases first cited with quotations from the opinions.

If under the State practice the original petitioners in the Burns' Ditch proceeding were the parties who are now seeking to have executed the decree establishing the ditch, Appellant could have made such petitioners defendants to its bill in the District Court, and presumably, under the *Simon's* case above cited, the District Court would have enjoined such petitioners from enforcing their decree in the drainage proceeding to the injury of Appellant's property. Under its general

equity powers a District Court of the United States has jurisdiction, where the necessary diversity of citizenship and jurisdictional amount are involved, or constitutional questions are presented, to enjoin a party who has obtained a judgment void for fraud or want of jurisdiction from enforcing such judgment. We submit that Appellant should not be deprived of its right to relief in this case by action of the judiciary of the State of Indiana in holding on the one hand that Appellant must proceed against Appellee rather than against the real parties in interest, and on the other hand, that Appellee is an agent of a court of the State, thus attempting to bring the case within the prohibition of Section 265.

As was said by Mr. Justice Harlan in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S., 239, 253, after stating that the judicial power of the United States extended to all suits involving controversies between citizens of different States:

> "A State cannot by any statutory provisions withdraw from the cognizance of the federal courts a suit or judicial proceeding in which there is such a controversy, otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated."

See a synopsis of this decision and further quotations from the opinion in the Appendix, pages 49-52.

By reason of the construction placed by the courts of Indiana upon the Drainage Act—to the effect that the drainage commissioner is an agent of the court, and stands for the original petitioning landowners in the drainage proceeding, and can alone be sued in a collateral attack upon the validity of the decree establishing the ditch,—the State of Indiana will have restricted the equitable jurisdiction

of the courts of the United States conferred by the Constitution and the Statutes of the United States, *if this Court shall hold that Appellant may not maintain its bill against Appellee because of Section* 265. We respectfully submit that this Court should not so hold, but on the contrary, should hold that Appellee, in performing his duties in constructing the ditch, represents and stands for the original petitioning landowners in the drainage proceeding for whose benefit the ditch will be constructed, and should therefor be enjoined from executing such construction under the principles established in the *Simons'* case.

* * * *

Counsel for Appellee may contend that since the Circuit Court of Porter County has taken jurisdiction of the subject matter of this drainage ditch, it should retain jurisdiction of the entire subject matter to the exclusion of every other court until its duty is fully performed and the jurisdiction involved is exhausted.

The answer to this contention is found in the fact that the Circuit Court of Porter County is not now and never has had jurisdiction over Appellant, nor can it acquire jurisdiction over Appellant without its consent, since Appellant is a nonresident of the State of Indiana and its property affected by the proposed Burns Ditch is located outside of the State of Indiana, and the Drainage Act provides no machinery for adjudicating the rights of the owner of property outside of the State. The issue in the drainage proceeding was not the issue presented in the court below.

In *McCollum* v. *Uhl,* 128 Ind., 304, 27 N. E., 152, a collateral proceeding to enjoin the collection of a ditch assessment, the Supreme Court of Indiana held that the owner of land affected by a proposed drainage *who was*

not made a party to the drainage proceeding would not be bound by the order establishing the drainage and could attack it collaterally.

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362, suit was brought against the railroad commissioners of Texas to enjoin the enforcement of unreasonable rates. In delivering the opinion of the court, Mr. Justice Brewer said (391):

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. *Cowles* v. *Mercer County*, 7 Wall. 118; *Lincoln County* v. *Luning*, 133 U. S., 529; *Chicot County* v. *Sherwood*, 148 U. S., 529."

See, also:

Smyth v. *Ames*, 169 U. S., 466, 516-17.

In *Colorado Eastern R. R. Co.* v. *Chicago, Burlington & Quincy Ry. Co.*, 141 Fed., 898 (C. C. A. 8th Circuit), the Burlington Company filed in a federal court its bill to enjoin the Colorado Company from instituting proceedings against complainant in the State court to condemn land belonging to complainant and used by it for railroad purposes. At the time the bill was filed a proceeding to condemn had already been instituted in the State court by the defendant against the apparent owner of record of the land in ques-

tion, although complainant was not itself a party defendant. The Court of Appeals for the Eighth Circuit held that Section 720 did not forbid the federal court enjoining such condemnation proceeding, *as complainant was not a party defendant in that proceeding,* and that Section 720 had no application "for the palpable reason that no jurisdiction was obtained of the subject or of the parties involved in the bill of complaint." Phillips, District Judge, in delivering the opinion of the Court said (902):

> "The bill of complaint does not disclose that any such condemnation proceeding had been instituted against the complainant, but the allegation is that the defendant threatens to begin such proceeding. The affidavits and the record presented by the defendant at the hearing only disclose the fact that in the month of March, 1905, just preceding the month in which the bill of complaint was filed, the defendant instituted such condemnation proceeding against the Burlington & Colorado Company, the apparent owner of record. This complainant was not named as a party defendant or served with any notice or process therein. This being conceded, the proceeding instituted in the state court, as to the complainant, was clearly *res inter alios acta;* and therefore, the provision of said Section 720 has no application, for the palpable reason that no jurisdiction was obtained of the subject or the parties involved in the bill of complaint."

Not having been a party to the drainage proceeding Appellant could have attacked it collaterally in the State court, and since the necessary diversity of citizenship and jurisdictional amount exist, and constitutional questions are raised, it has the same right to attack the decree in a court of the United States.

* * * *

Counsel for Appellee may further contend that Appellant should not be permitted to arrest the construction of the ditch by injunction while refusing to submit to

the jurisdiction of the Circuit Court of Porter County which has authority over the construction of the ditch. It is possible that under Section 8 of the Drainage Act (Appendix, pp. 34, 71-72.) Appellant would have the right to file a supplemental petition in the drainage proceeding and there raise the issues presented by its bill in the court below; but it is doubtful whether a court of Indiana can compel property owners in Indiana benefited by the proposed ditch to pay the damages sustained to property of a nonresident located outside of the State. Irrespective of its right to voluntarily appear in and to become a party to the drainage proceeding, Appellant, by virtue of the diversity of citizenship in this case and the jurisdictional amount involved, and the existence of constitutional questions, is entitled to have its rights adjudicated in a federal court, subject to the restrictions contained in Section 265. This Court has held that "one who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

Smyth v. *Ames,* 169 U. S., 466.

The rule seems to be well established by the decisions of this Court that Appellee, although an agent of the State of Indiana, may be enjoined from constructing the Burns' Ditch, if such action on his part will deprive Appellant of rights protected by the Constitution of the United States.

Ex parte Young, 209 U. S., 123, 150, 155.
Smyth v. *Ames,* 169 U. S., 466, 518-519.
Greene v. *Louisville & Interurban R. R. Co.,* 244 U. S., 499, 506-507.

• • • • •

In conclusion, we again emphasize the fact that Appellant is a citizen of the State of Illinois, is engaged in business in that State, and its property which will be damaged by the construction and operation of the proposed ditch is located in that State. Appellant is not amenable to the laws of Indiana, is not subject to the process of the courts of that State, at least with respect to its property located outside of that State, and it cannot be compelled by Indiana legislation to litigate in the courts of Indiana any rights in property located outside of that State. The ditch is to be constructed by a citizen of Indiana, in whatsoever capacity he may act.

The courts of the United States were created for the very purpose of affording relief to a litigant in such a situation as exists in this case. To hold that Section 265, which admittedly relates only to judicial proceedings, prevents a court of the United States from granting the relief sought in this case would be giving to that Section an interpretation entirely at variance with the interpretation previously adopted by this Court.

We respectfully submit that the District Court erred in dismissing the bill for want of jurisdiction and that its decree should be reversed and the case remanded for further proceedings.

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APPENDIX.

Analysis of Indiana Drainage Act of 1907.

Section 1 provides that the board of commissioners of each county shall appoint a citizen of the county as drainage commissioner. The county surveyor is named *ex officio* a second commissioner. Each is required to give a bond for the faithful discharge of his duties as drainage commissioner.

Section 2 provides that whenever the owners of tracts of land lying outside the corporate limits of a city shall desire to drain such tracts of land and such drainage cannot be accomplished in the best and cheapest manner without affecting the lands of others, such owners may apply for such drainage by petition filed in the Circuit or Superior Court of the county in which petitioners' lands are situated. Such petition shall describe the lands which will be affected by the proposed drainage and shall give the names of the owners thereof if known, or if not known, such fact shall be stated. The petition shall also state that in the opinion of petitioners the public health will be improved or that the proposed work will be of public utility, and it shall state generally the method by which it is believed such drainage can be accomplished most economically and the belief of petitioners that the expense of such drainage will be less than the benefits resulting to the owners of lands affected.

Section 3 provides that upon the filing of such petition in the office of the clerk of the court the petitioners shall fix a date for the docketing thereof and shall give notice thereof to all landowners mentioned in the petition. Such notice must be served upon such landowners

in person or by leaving a copy at his usual place of residence. As to nonresident landowners mentioned in the petition, notice must be given by posting notices in three places designated in the township in which such lands are situated and by sending a copy of such notice by mail to such nonresidents if their address can be ascertained, and also by causing publication of such notice. If such notice is given not less than 20 days before the date set for docketing the petition, the court orders the petition to be placed upon the docket as a pending action. Any person named in the petition as a landowner may file in court objections to the petition within 10 days after the date of such docket. After the expiration of the 10 days the court passes upon the objections and if it shall find the petition defective, it shall dismiss the same, unless amended, or if it deems the petition sufficient, it shall enter an order appointing a third drainage commissioner to act with the other two, and shall refer the petition to the three commissioners, and fix a time and place for the meeting of the commissioners and a time when they must report to the court. The commissioners must then make personal inspection of the lands described in the petition and of other lands likely to be affected by the proposed work. If they find that the drainage proposed is impracticable and will not improve the public health or benefit any public highway or be of public utility, or that the expense of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage, they shall so report their finding to the court and thereupon the petition shall be dismissed. If they find otherwise, they shall proceed and determine the best and cheapest method of drainage and the route and character of the proposed work and establish the same by

metes and bounds and shall estimate the cost thereof dividing the ditch into sections and shall assess the benefits or damages, as the case may be, to each separate tract of land to be affected, including easements held by corporations and any land, rights, easements or water power injuriously or beneficially affected, and shall report their findings to the court. The commissioners may determine what the method of drainage shall be—by removing obstructions from a natural or artificial watercourse or diverting such watercourse from its channel or by constructing an artificial channel or by various other means. In case any lands are named in the report as affected by the proposed work which are not named in the petition, the court shall fix a time for hearing the report upon notice to the owners of such lands.

Section 4 provides that upon the making of such report to the court any landowner affected by the work proposed and reported benefited or damaged may remonstrate against the report within 10 days after the filing thereof. Upon the hearing of the remonstrances the court may direct the commissioners to amend and perfect their report, or may refer the matter anew to the commissioners in case the report is defective; or the court may modify and equalize the assessments established in the report and for such purposes all persons whose lands are reported as affected or are stated in the petition as affected, shall be deemed to be in court by virtue of the notices previously given; or the court may confirm assessments stated in the report. If the court shall determine that it will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits, or that the proposed work will neither improve the public health nor bene-

fit any public highway nor be of public utility, or that the proposed work will not properly drain the land to be affected, the court shall order the proceedings to be dismissed. If the court shall approve the proposed work and shall be satisfied with the assessments therefor, or shall equalize the assessments to its satisfaction "it shall make an order declaring the proposed work established, and approving assessments as made by the commissioners, or as equalized and modified as above provided for, and shall assign the same to one of the three commissioners above provided for, for construction, or the court may assign it for construction to any disinterested freeholder of the county." All questions of fact arising on the petition, report or remonstrances, shall be tried by the court without a jury. The order of the court approving and confirming the assessments, and declaring the proposed work of drainage established, shall be final and conclusive, unless an appeal therefrom to the Supreme Court shall be taken within 30 days.

Section 5 provides that the commissioner charged with the execution of the work shall proceed to have the same constructed. He shall pay all expenses incident to such construction and costs of the proceeding. He shall pay all damages assessed and allowed by the court and the cost of constructing the work. He shall collect all assessments of benefits reported by the commissioners as adjusted by the court for the purpose of meeting the expenses of construction, apportioning such collections pro rata among the assessed property owners. He shall divide the work into sections and let the work of construction by public bidding. In case an assessed landowner shall become delinquent in his payments, the commissioner shall certify such fact to the county auditor, who shall cause same to be collected the

same as other delinquent state and county taxes are collected.

Section 5½ provides for the issuance of drainage bonds under certain conditions, but has no special bearing upon the issues in this case.

Section 6 provides that the filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein and not named in the original petition, and the amount of assessments when approved by the court shall be a lien upon the lands assessed. The construction commissioner shall record in the office of the recorder of each county where the lands are situated, a notice that the work has been established by the court and the respective assessments upon the lands affected.

Section 7 provides that the commissioner shall keep an accurate account of all work done and moneys collected by him and of all payments made on account of work. He must make a full report of the work to the court as often as once in six months, and the court shall allow him for his services a fixed amount per day for the time actually employed, subject to a maximum limitation. The construction commissioner "shall at all times be under the control and direction of the court, and shall obey such directions; and for failure so to do shall forfeit his compensation and be dealt with summarily as for contempt, and may also be removed from office by the court." The court may at any time direct another one of the commissioners to proceed with the construction of the work and may at any time discharge therefrom the commissioner appointed. Laborers and ma-

terialmen are given a lien upon the fund for the payment of their claims. And in case of any disagreement between the contractors or any such laborer or materialman claiming such lien, the court shall upon motion of the commissioner, the contractor or the person claiming such lien, determine such matter.

Section 8 provides that the act shall be liberally construed to promote the drainage and reclamation of overflowed lands, and the collection of assessments shall not be defeated because of any defect in the proceedings prior to the judgment establishing the ditch, but such judgment shall be conclusive that all prior proceedings were regular, and no person may take advantage of any error, defect or infirmity unless such person is directly affected thereby. Any person interested may file with the court a supplemental petition showing that lands not mentioned in the original report are affected by the proposed drainage, in which case the court shall require such person to give notice to the persons affected thereby and shall refer the petition to the drainage commissioners for a report and proceedings may thereafter be had thereon as if it were an original petition, but such proceedings shall not affect the original petition unless the court shall order the same consolidated and made a part thereof.

Section 8½ provides that whenever a ditch is to be constructed, widened, deepened, straightened or changed so near to the state line between the State of Indiana and any adjoining State that the work proposed to be done will affect lands in the adjoining State, the Board of Commissioners, or their proper officers, of the several counties in Indiana so adjoining such other State, shall have authority to join with the proper officers of the adjacent counties of such other State in such construction,

widening, deepening, straightening or otherwise changing such ditch. The Commissioners of the counties of this State are given power to enter into contracts jointly with the proper officers of the adjoining counties in the other States to construct, repair or improve any such ditch, each paying a proportionate part of the expenses thereof.

Section 9 provides for the payment by townships, towns and cities of assessments against highways, streets and other public places therein.

Sections 10 to 16, inclusive, provide for repairing and maintaining ditches when once constructed. The work generally is under the supervision of the Trustee of the Township in which the ditch is located. The county surveyor allots portions of the ditch to the property owners along the ditch who are required to keep the same clean and in repair. In case of their failure to do so the Township Trustee shall provide by contract to have the work done. If any landowner objects to his allotment he may appeal to the Circuit or Superior Court of the county and have his allotment reviewed.

Section 17 provides that when a proposed work of drainage, and the lands affected thereby, are located wholly within one county, the petitioning landowners may apply by petition to the Board of Commissioners of such county in like manner as hereinbefore provided with respect to an application to the Circuit or Superior Court of the county. Similar proceedings are then taken by the Board of County Commissioners as are taken by the court in other cases. Appeals may be taken from the decision of the Board of County Commissioners to the proper court of the county.

Section 18 requires a landowner adjoining a ditch to keep the operation of the ditch adjoining his land free

from obstructions caused by cattle or other stock on his land.

Section 19 provides that the owners of land adjoining a ditch upon applying by petition to the Circuit or Superior Court or the Board of Commissioners, as the case may be, may change the nature of the construction of the ditch by tiling or covering the ditch or by changing it in other respects. Similar proceedings are then taken as in the case of original construction, and the changes asked in the petition may be allowed by the court and made by the parties.

Section 20 provides that the repair of all ditches, other than dredge ditches, shall be under the supervision of the Township Trustees, provided, however, that upon petition of one-third of the persons whose lands are assessed upon any ditch the Township Trustees shall turn the work of repair and supervision over to the County Surveyor.

SYNOPSIS OF DECISIONS AND QUOTATIONS FROM OPINIONS.

Prentis v. *Atlantic Coast Line,* 211 U. S., 210.

In this case certain railroad corporations filed bills in equity in the federal court in Virginia to enjoin members of the Virginia State Corporation Commission from enforcing an order fixing passenger rates, on the ground that such rates were confiscatory and unconstitutional. The defendants argued that the proceedings before the Commission were proceedings in a court of the State, which could not be enjoined by a federal court under Section 720. This Court assumed for the purpose of its decision that the Commission was for some purposes a court within the meaning of Section 720, and in the commonly accepted sense of that word, and that it had been clothed by stat-

ute with legislative, judicial and executive powers. This Court further assumed, without deciding, that if the proceeding before the Commission against the railroad companies had been to enforce the Commission's order regulating rates and to punish the railroad companies for a breach of such order, then the Commission would be sitting as a court and would be protected from interference on the part of a federal court. This Court, however, held that the proceeding of the Commission in fixing passenger rates was *not judicial,* but was *legislative* in nature, and that such a proceeding was not a proceeding in a court within the meaning of Section 720, even though the general or dominant character of the Commission was judicial. In other words, this Court held that an act of a judicial body which was *legislative in nature* and which was unconstitutional could be enjoined by a federal court, and that such action by the court was not forbidden by Section 720. In delivering the opinion of the Court Mr. Justice Holmes said (pp. 225-7):

> "In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned. *Dreyer* v. *Illinois,* 187 U. S. 71, 83, 84; *Winchester & Strasburg R. R. Co.* v. *Commonwealth,* 106 Virginia, 264, 268. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.
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> But we think it equally plain that the proceedings drawn in question here are legislative in their na-

ture, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Sec. 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth* v. *Atlantic Coast Line Ry. Co.*, 106 Virginia, 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others* v. *Commonwealth*, 106 Virginia, 264, 281. See further *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 440.

Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. Sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94, affirmed *sub nom. McNeill* v. *Southern Ry. Co.* 202 U. S. 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S. 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats. Sec. 709, and Act of February 18, 1875, c. 80, 18 Stat. 318. See *Upshur County* v. *Rich*, 135 U. S. 467; *Wallace* v. *Adams*, 204 U. S. 415, 423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined

by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering* v. *Barkley,* Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata,* if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called."

Mississippi Railroad Commission v. *Illinois Central Railroad Company,* 203 U. S., 335.

The Railroad Company filed a bill in the Circuit Court of the United States to enjoin the Railroad Commission of Mississippi from enforcing an order requiring it to stop certain of its trains at a small station upon its line. It was urged that

the Commission was a court and that under Section 720, a federal court could not enjoin its acts. In delivering the opinion of the Court Mr. Justice Peckham said (p. 341):

> "It is also objected that an injunction will not lie from a United States court to stay proceedings in a state court, because of the provisions of Section 720, United States Revised Statutes. 1 Comp. Stat. 581. The commission is, however, not a court, and is a mere administrative agency of the State, as held by the Mississippi court. *Telegraph Co.* v. *Railroad Commission,* 74 Mississippi, 80."

Louisville & Nashville R. R. Co. v. *Garrett,* 231 U. S., 298.

A bill was filed by the Railroad Company in the Circuit Court of the United States to enjoin the Railroad Commission of Kentucky from enforcing two orders of the Commission, one prescribing maximum rates, and the other awarding certain amounts in reparation for payments previously made to the Railroad Company for the transportation of merchandise in excess of rates previously established by the Commission. The lower court denied a motion for an interlocutory injunction. This Court affirmed the order of the lower court. It was contended that the act creating the Railroad Commission violated the State constitution by undertaking to confer judicial powers upon the Commission, whereas under the constitution judicial powers could be vested only in the courts of the state. This Court held that prescribing rates for the future was an act legislative and not judicial in kind. In the course of his opinion Mr. Justice Hughes said (p. 305):

> "It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. *Interstate Commerce Commission* v. *C., N. O. & T. P. Ry. Co.,* 167 U. S. 479, 499; *Mc-*

Chord v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483, 495; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

And further (p. 307):

"The contention is that, before the Commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and, it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the Commission ascertain whether the former, or existing, rate, was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether

other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. *It is 'the nature of the final act' that determines 'the nature of the previous inquiry.'*" (Italics ours.)

Southern Ry. Co. v. *Greensboro Ice and Coal Co.*, 134 Fed., 82.

A bill was filed in the United States Circuit Court to enjoin the Commissioners of the North Carolina Corporation Commission and certain other parties from bringing suits for penalties and damages by reason of the refusal of the complainant to comply with certain orders of the Commission. It was contended that the proceedings of the Commission were court proceedings, and could not be enjoined by a federal court. Upon this point Purnell, District Judge, said (p. 94):

> "True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a state court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this court as to state courts does not apply, *especially inasmuch as the acts complained of and asked to be enjoined are not judicial acts. As to these acts it is a state agency, not acting judicially.*" (Italics ours.)

The decision of the District Judge was affirmed by this Court in the case of *McNeill* v. *Southern Railway Co.*, 202 U. S., 543.

Simon v. *Southern Ry. Co.*, 236 U. S., 115.

One Simon obtained a judgment in a State court of Louisiana without notice to the Railway Company. The Railway Company thereupon filed its bill in the federal court to enjoin Simon from enforcing his judgment. This

Court held that Section 720 did not forbid a federal court from enjoining the execution of a void judgment. In delivering the opinion of the Court, Mr. Justice Lamar said (121-2):

> "The primary question whether the United States court had jurisdiction of the case must of course be determined by considering the allegations of the Bill. It shows diversity of citizenship and charges that Simon was seeking to enforce by levy a judgment obtained by fraud and *without notice* to the Railway Company. If that be so the United States courts, by virtue of their general equity powers, had jurisdiction to enjoin the plaintiff from enforcing a judgment thus *doubly void.* For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment * * * it will deprive them of the benefit of it.' *McDaniel* v. *Traylor,* 196 U. S., 415, 423. Much more so will equity enjoin parties from enforcing those obtained without service. For in such a case the person named as defendant 'can no more be regarded as a party than any other member of the community.' Such judgments are not erroneous and not voidable but upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to a plaintiff who if concerned in executing such judgments is considered in law as a mere trespasser. *Harris* v. *Hardeman,* 14 How. 339 (default judgment entered on improper service). *Williamson* v. *Berry,* 8 How. 541; *Scott* v. *McNeal,* 154 U. S., 46; *Western Indemnity Co.* v. *Rupp,* 235 U. S. 273.
>
> On principle and authority, therefore, a judgment, obtained in a suit in which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief."

And further (123-7):

> "The Appellant, Simon, however, contends that even if there was equity in the bill; and even if the Railway Company could have brought a new and independent suit in the state court to enjoin him from using the judgment,—yet in the present case the

Federal Court was without power to afford the same relief because Sec. 720 of the Revised Statutes provides that, except in bankruptcy cases, a United States court shall not 'stay procedings in any court of a State.'

In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole* v. *Cunningham*, 133 U. S., 107. This, of course, often gave rise to irritating controversies between the courts themselves which could, and sometimes did, issue contradictory injunctions.

On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. *Diggs* v. *Wolcott*, 4 Cranch. 179, 180 (1807), and *Hull* v. *Burr*, 234 U. S. 712 (1914) (the first and last cases in this court dealing with that question), furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited, show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet Sec. 720 prevented the Federal court from staying the proceedings in the state court.

But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. In the nature of the case, however, there are few decisions dealing with such a question. For where the state court had jurisdiction of the person and subject matter the judgment rendered in the suit would be binding on the parties until reversed and there would, therefore, usually be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See *Marshall* v. *Holmes*, 141 U. S. 600, where *Nougue* v. *Clapp*, 101 U. S. 551, relied on by Appellant, is discussed.

There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in *Julian* v. *Central Trust Company,* 193 U. S. 112, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the Federal court, was in possession of a purchaser who held under the conditions of a Federal decree. It was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it may have been perfectly valid in itself.

Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use,—by so much the more can the Federal courts enjoin him from using that which purports to be a judgment but is, in fact, an absolute nullity. *Marshall* v. *Holmes,* 141 U. S. 597; *Gaines* v. *Fuentes,* 92 U. S. 10; *Barrow* v. *Hunton,* 99 U. S. 85.

That the United States Circuit Court here could enjoin Simon from enforcing a void judgment against the Southern Railway Company, has already been ruled in another branch of this very case. In *habeas corpus* proceedings (*Ex parte Simon,* 208 U. S. 144) he sought relief from the punishment imposed because of his violation of the temporary injunction granted in this cause. He there claimed that the attachment for contempt was void because the court was without power to issue the injunction which he had violated. On that subject this court said:

'This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. Sec. 720, forbidding United States courts to stay by injunction proceedings in any state court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in *Marshall* v. *Holmes,* 141 U. S. 589, and the earlier cases cited in that case.'

The appellant insists, however, that *Marshall* v. *Holmes,* referred to as conclusive unless overruled, does not support the jurisdiction of the Circuit Court because there no injunction was granted by the United States court.

In that case Mrs. Marshall brought a suit, in a Louisiana court, and obtained a temporary injunction restraining Holmes, Sheriff, from levying Mayer's judgments alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court where the temporary injunction was dissolved. That decree was affirmed by the Supreme Court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the Appellee contended that 'it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered.' In considering that contention (which is substantially the same as that urged by the Appellant Simon here), the court asked 'whether, where the requisite diversity of citizenship existed, the Circuit Court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court?' In answering this question the court pointed out the difference between enjoining a court and enjoining a party; and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the Circuit Court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgments if they were found to be fraudulent in fact, saying that the

'Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another juris-

diction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. "It would simply take from him the benefit of judgments obtained by fraud." And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service.' "

Hunt v. *New York Cotton Exchange,* 205 U. S., 322.

One Hunt, a broker carrying on his business in Tennessee, was receiving quotations of the New York Cotton Exchange through the Western Union Telegraph Company under a contract with the Telegraph Company. The Exchange entered into an agreement with the Telegraph Company by the terms of which the Telegraph Company agreed not to furnish quotations to brokers who had not obtained quotation privileges from the Exchange. Pursuant to such agreement the Telegraph Company notified Hunt that it would discontinue furnishing him quotations, whereupon he filed a bill in the State court of Tennessee to compel the Telegraph Company to continue such service. While the proceeding was pending and an injunction had been issued restraining the Telegraph Company from discontinuing such service, the Exchange filed a bill in the federal court in Tennessee to enjoin him from receiving quotations of sales upon the Exchange. The case came before this Court on jurisdictional questions only, and this Court held that Section 720 did not forbid the federal

court enjoining Hunt from using such quotations, although there was then in the State court a proceeding under which he was given the right to use such quotations. This Court held that the case in the federal court was not the same as to parties or purposes as the case in the State court, and that the pendency of the suit in the State court did not deprive the federal court of jurisdiction.

In delivering the opinion of the Court Mr. Justice McKenna said (338-9):

> 'The next contention of appellant is that the court had no jurisdiction to grant the injunction and pronounce the decree appealed from. The only question involved in this branch of the case, appellant says, is 'whether it comes within the provision of the Revised Statutes, § 720, which is to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings of any court except in matters of bankruptcy.'
>
> And, appellant insists, that this suit necessarily offends that section, because under its decree he cannot have the benefit of the judgment of the state court without being in contempt of the Federal court,' and that he is restrained by the Circuit Court from receiving from the Telegraph Company what the company is forbidden to refuse him by the state court. To sustain his contention appellant cites *United States* v. *Parkhurst Davis Mercantile Company*, 176 U. S. 317, and cases there referred to. Also *Diggs* v. *Woolford*, 4 Cranch, 179; *Watson* v. *Jones*, 13 Wall. 579; *Dyall* v. *Reynolds*, 96 U. S. 340; *Central &c. Bank* v. *Stevens*, 169 U. S. 433. These cases do not sustain his contention. In *Central Bank* v. *Stevens* it was decided that a state court had no power to enjoin a party whose rights had been adjudged by a Circuit Court of the United States from proceeding with a sale of property under a decree of that court. In the other cases cited, except *Watson* v. *Jones*, the purpose was to directly enjoin parties from proceeding in the state courts. In *Watson* v. *Jones* was considered what identity of

parties, rights and relief prayed for were necessary to enable the pendency of an action in one court to be pleaded in bar in another court, and it was said: 'The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.' The principle was also expressed in that case, and sustained by authorities, that the possession of property by one court cannot be interfered with by another, and, that 'The act of Congress of March 2, 1793 (now § 720 of the Revised Statutes of the United States) as construed in *Diggs* v. *Walcott*, 4 Cranch, 179, and *Peck* v. *Jenness*, 7 How. 625, are equally conclusive against any injunctions from the Circuit Court, forbidding the defendants in the case to take possession of property which an unexecuted decree of a state court required the marshal to deliver to them.' The case at bar has not that feature, nor has it identity with the case in the Chancery Court of Shelby County. Its parties and purposes are different. The pendency of a suit in a state court does not deprive a Federal court of jurisdiction. *Gordon* v. *Gilfoil*, 99 U. S. 168; *Insurance Co.* v. *Brunes' Assignee*, 96 U. S. 588; *Stanton et al.* v. *Embrey, Administrator*, 93 U. S. 548; *Merritt* v. *American Barge Co.*, 79 Fed. Rep. 228; *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383."

Madisonville Traction Co. v. *St. Bernard Mining Co.*, 196 U. S., 239.

The Traction Company, a Kentucky corporation, began a proceeding in a State court of Kentucky to condemn for its use certain lands belonging to the Mining Company, a Delaware corporation. The Mining Company attempted to remove the case to the Circuit Court of the United States. The State court held that the case was not a removable one and, therefore, proceeded with the case. The Mining Company

thereupon filed a bill in the Circuit Court of the United States to enjoin the Traction Company from further prosecuting its suit in the State court. The Traction Company demurred to the bill. The Circuit Court overruled the demurrer and as the Traction Company elected to stand by its demurrer, a final decree was entered enjoining it from further prosecuting its case in the State court. Upon appeal this Court affirmed the decree of the Circuit Court. It was argued that the condemnation proceeding was of such nature that it could not be removed. This Court held that it was a controversy between citizens of different States and that the necessary jurisdictional amount was involved and that the case was removable. Mr. Justice Harlan, in delivering the opinion of this Court, cited an extract from a decision by Mr. Justice Brewer in Colorado Midland Railway Co. v. Jones, 29 Fed., 193, reading as follows (249):

> "I do not suppose that a State can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the legislature could provide for the trial of many cases by less than a common law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two States, could not be removed to the Federal courts. If this were possible, then the only thing the legislature of a State would have to do to destroy the right of removal entirely would be *to simply change and modify the details of procedure.*"

Further in his opinion Mr. Justice Harlan said (252-4):

> "Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, *within its limits*, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned

and taken. *But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States.* 'A State cannot,' this court has said, 'tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.' *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

Now, it is true that the Circuit Court could not have the property in question condemned for local public purposes, if the State had not previously, by statute, authorized its condemnation. After the removal of a case of condemnation from a state court the Federal court would proceed under the sanction of state legislation. It would enforce the state law, unless that law authorized the appropriation of private property for purposes that were not really of a public nature. So far as authority to take the property for local public purposes was concerned, the Circuit Court could not enforce any other than the state law. It would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken, upon compensation to the owner being made or secured. But at the same time it could enforce, as of course it must, the authority of the Supreme Law of the Land, which expressly extends the judicial power of the United States to all suits involving controversies between citizens of different States, and which also, by statute, gives the Circuit Courts of the United States, without qualification, jurisdiction of such controversies. *A State cannot by any statutory provisions withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy. Otherwise the purpose of the Constitution in extending the judicial power of the United States to controversies between citizens of different States would thereby be defeated.* If the judiciary act of Con-

gress admitted of the case in the County Court being brought within the original cognizance of the Circuit Court, that is an end of the matter, although it be a case of the appropriation of private property to public uses under the authority of the State. Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves, in a National court, against local prejudice and influence.

It may, however, be urged that the Delaware corporation can be fully protected by the state court in its rights of property, because, if any Federal right be denied it, the authority of this court can be invoked upon writ of error to the highest court of the State. But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from the state court. Such questions would not ordinarily involve a Federal right. In the present case the commissioners reported the damages to be only $100; whereas, the owner alleges that the amount awarded was grossly inadequate, practicaly confiscatory. That question, as well as the question whether the statute authorized the Traction Company to take the property, the Delaware corporation is constitutionally entitled, as between it and the Kentucky corporation, by reason of the diverse citizenship of the parties, to have determined upon their merits in a court of the United States, in which, presumably, it will be protected against local prejudice or influence. The Circuit Court, recognizing the right of the Traciton Company to appropriate the land in question, if necessary for its purposes, could do all that is required by the Kentucky statute, and meet fully the ends of justice. Besides, a court always looks to substance and not to mere forms. Mere forms are not of vital consequence in cases of condemnation. *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 519." (Italics ours.)

CHAPTER 252.

AN ACT CONCERNING DRAINAGE, AND REPEALING LAWS IN CONFLICT.

[S. 214. Approved March 11, 1907.]

Drainage—Commissioner—Appointment.

SECTION 1. Drainage—Commissioner—Appointment.—*Be it enacted by the general assembly of the State of Indiana,* That it shall be the duty of the board of commissioners of each county in this state, at their first regular session in January after the taking effect of this act, to appoint a drainage commissioner, who shall be a person of intelligence and good judgment, and a reputable citizen of the county who shall hold his office for two years and until his successor shall be appointed and qualified, unless sooner removed by the board of commissioners. The board of commissioners may remove such drainage commissioner from office at any time, and whenever there shall be a vacancy in such office the board of commissioners may fill the same by appointment at any regular or special session of said board. Every such drainage commissioner shall, before entering upon the discharge of his duties, take and subscribe an oath of office, and shall give bond payable to the State of Indiana, with sureties and in a penalty of not less than five thousand dollars, to be filed with and approved by the auditor of such county, conditioned for the proper and faithful discharge of his duties, and that he will account according to law for all money that shall come to his hands as such commissioner. The auditor shall thereupon issue to such commissioner a certified copy of the order of his appointment. The county surveyor shall be ex officio a drainage commissioner, and shall give a bond as above required of the drainage commissioner in addition to his ordinary official bond. Such drainage commissioner provided for herein and the third commissioner appointed by the court shall each receive as compensation for all services provided for in this act three ($3.00) dollars per day, and the surveyor shall receive four ($4.00) dollars per day, each of them being paid for

the time he has actually engaged in the prosecution of the duties required herein.

Petition—Contents—Bond.

SEC. 2. Petition—Contents—Bond.—Whenever any owner or owners of any separate and distinct tract or tracts of land lying outside the corporate limits of any city or town in this state, or whenever a township trustee shall desire to provide for the drainage of a public highway or the grounds of a public school, or whenever the common council of any incorporated city or board of trustees of any town shall find it necessary for the successful drainage of any such lands, public highway, grounds of a public school, incorporated city or town shall desire to drain the same and the drainage thereof can not be accomplished in the best and cheapest manner without affecting the lands of others such owner or owners, township trustee, common council or board of trustees, as the case may be, may apply for such drainage by petition filed in duplicate to the circuit court or superior court of the county in which the lands of the petitioner or petitioners are situated. The petition shall describe in tracts of forty acres according to fractions of government surveys, or less tracts when they exist, and in Clark's grant and the French grant, and all pre-emptions of Indian reservation in such tracts [as] are owned, the lands of others, which it is believed will be affected by the proposed drainage, and give the names of the owners thereof, if known, or upon diligent inquiry can be ascertained, and if unknown shall so state. If the name of the owner is unknown and can not be ascertained on diligent inquiry it shall be sufficient to describe such land as belonging to the person or party who appears to be the owner by the last tax duplicate or record of transfers kept by the auditor of the county in which such land is situated. If any of the lands to be benefited lie within the corporate limits of any city or town in this state, the same shall be described by lots and the numbers thereof as shown by the plat books of such city or town. Such petition shall be sufficient to give the court jurisdiction over all lands described therein and power to fix a lien thereon, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the audi-

tor of the county where the same is situated. If the right of way of any railroad company is believed to be affected, it shall be sufficient to describe it as the right of way of such railroad company, naming it through section, township and range, giving the numbers of the same. It shall also state that in the opinion of the petitioners that the public health will be improved, or that one or more public highways of the county, or street or streets of, or within the corporate limits of a city or town, will be benefited by the proposed drainage, or that the proposed work will be of public utility; and it shall state generally the method by which it is believed such drainage can be accomplished in the cheapest and best manner, and the belief of the petitioners that the costs, damages and expenses of such drainage will be less than the benefits which will result to the owners of the lands likely to be benefited thereby. And all the assessments made upon the owners of such tracts, parcels and lots of lands as may be benefited by such drainage shall be in such equitable proportion as such drainage commissioners may deem just: *Provided, also,* That [at] the time of filing of said petition said petitioner or petitioners shall give a bond with good and sufficient freehold sureties, payable to the state, to be approved by the court, conditioned to pay all expenses in the event the court shall fail to establish said proposed drain: *Provided,* That when any such proposed drain will run into two or more counties, or on the county lines dividing two counties, the circuit court or the superior court of the county having the greatest length of said proposed ditch shall have jurisdiction of said work: *Provided,* That when said ditch, drain or levee extends into more than one county, one of the drainage commissioners herein provided for shall be appointed by the court from one of such other counties.

Docketing—Notice—Third Commissioner—Objections—Proceedings.

SEC. 3. Docketing—Notice—Third Commissioner—Objections—Proceedings.—Whenever the petitioner or petitioners shall file their petition in the clerk's office of the circuit or superior court, he or they shall fix or note thereon the day set for the docketing thereof and shall give the owner or occupant of each tract of land described in said petition, who is a resident of the county

or counties in which said land is situated, and to the trustee of the township, mayor of the city, president of the board of trustees of every town or city, and the agent of any railroad company or corporation or company, public or private, to be affected by the proposed work, notice thereof by serving upon such owner or occupant, persons or party, a written or printed notice setting forth the route of such drain as described in the petition, the fact of the filing and pendency of such petition, and when the same shall be docketed, which notice may be served by the petitioner or petitioners, or either of them, or by any person for them, by delivering a copy to the person to be notified, or by leaving such copy at his last and usual place of residence, and proof thereof made by the affidavit of the person making such service. The service of such notice upon the station agent of any railroad company in the county in which the proceedings are instituted shall be sufficient notice to such railroad company, and in case there be no agent of such railroad in the county, such company shall be notified in the same manner as other non-resident land owners, and as to all owners of lands to be affected by such proposed drainage, who at the time of filing the petition are nonresidents of the county or counties in which the lands to be affected are situated; notice of the filing, pendency, and the time fixed for docketing of said petition shall be given by posting up written or printed notices thereof at three public places in each township where the lands described in said petition are situated, and near the line of the proposed work, and one at the door of the court house in each of the counties in which said lands are situated, and by sending through the United States mail a copy of such notice to nonresidents, if their postoffice addresses can be ascertained by inquiry at the office of the county treasurer of the county, which notices shall be similar in form to those required to be served on resident owners; and by causing to be published for two times in each of the two leading newspapers representing the two political parties casting the largest number of votes at the last preceding state or general election, which said notice shall contain only the names of land owner or owners who are nonresidents of the county or whose residence can not be ascertained, but in all other respects shall be similar in form to those required to be served on resident land owners; and if it appears to the court

that notice has been given of the filing of said petition by service of notice upon resident land owners, and by posting and publication of notices as above provided not less than twenty days before the day set as the day for docketing the same, the court shall order the same placed on the docket of said court as an action pending therein. Any person named in such petition as the owner of lands shall have ten days, exclusive of Sunday, and the day for docketing such action after such docketing, to file with said court any demurrer, remonstrance or objection he may have to the form of said petition, or as to why said drainage commissioners, or either of them, on account of their interest in said work, or kinship to any person whose lands are affected thereby, should not act in the matter. After said ten days have elapsed, the court shall consider such remonstrance, demurrer or objection, if any, and, if it finds said petition defective, shall dismiss the same at the cost of the petitioner or petitioners, unless the same shall be amended within a time fixed by the court: *Provided,* That if within twenty (20) days, exclusive of Sundays, from the day set for the docketing of such petition, two-thirds in number of the land owners named as such in such petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of such drain or ditch, such petition shall be dismissed at the cost of the petitioners: *Provided,* That in cases pending at the time of taking effect of this act where a two-thirds remonstrance has not been filed, such remonstrance may be filed to the report of the drainage commissioners, except in cases pending on petition filed under the act of the general assembly of the State of Indiana entitled "an act concerning drainage" approved March 6th, 1905. If no remonstrance shall be filed, and the court deems said petition sufficient, such court shall make an order referring the same to the drainage commissioners above provided for: *Provided,* That when such order shall be made referring such petition to the drainage commissioners, it shall be the duty of the court to appoint a third drainage commissioner to act therein, who shall be a reputable freeholder, not related to any land owner affected, disinterested, and a man of intelligence and good judgment, and a resident of some township through or into which such ditch or drain is pro-

posed to be constructed, who shall take an oath that he will faithfully and honestly perform his duties, before entering thereon; and it shall be the duty of the petitioners, at their own cost, to give notice to such person of such appointment. All objections to the petition or the acting of any drainage commissioner not made within said ten days shall be deemed waived. In the order of referring said matter to said commissioners, the court shall fix a time and place for the meeting of said commissioners, and a time when they shall report. The clerk shall deliver to them a duplicate copy of such petition and of such order, and they shall meet accordingly. They shall make personal inspection of the lands described in the petition, and of all other lands likely to be affected by the proposed work; and consider: First, whether the drainage proposed is practicable; second, whether, when accomplished, it will improve the public health or benefit any public highway in the county or street of a town or city, or be of public utility; and third, whether the costs, damages and expenses of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage. If they find any of these inquiries in the negative, they shall make report of such finding to the court, and thereupon the petition shall be dismissed at the cost of the petitioners. But if they find otherwise, they shall proceed and definitely determine the best and cheapest method of drainage, the termini and route, location and character of the proposed work, and fix the same by metes and bounds, courses and distance and description, including grades and bench marks, including all necessary arms, estimate the cost thereof, divide the drain or ditch into sections not more than one hundred feet in length, and compute and set out the number of cubic yards of excavation in each section, assess the benefits or damages as the case may be to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns, or other public or private corporations, including any land, rights, easements or water power injuriously or beneficially affected and to make report to the court, under oath, as directed: *Provided, also,* That when any ditch, drain, or levee, runs into another county than the one where such proceeding therefor as aforesaid are instituted, no bridge, culvert, or road in such other county shall be destroyed, injured or

interfered with, unless the damage to be occasioned thereby to such bridge, culvert or road has been considered, estimated and assessed by the said drainage commission, and the payment of such damages to such county provided for by assessing the same pro rata as other damages are assessed. The drainage commissioners, in locating the line or lines of work of drainage, may vary from the line described in the petition as they deem best and may fix the beginning or outlet so as to secure the best results; they may run the line so as to avoid all injury possible to lands, easements or public grounds and so as to benefit public highways, streets or alleys, by using the earth excavated for road beds, or in any other way they deem best: *Provided,* That in no case shall they change or construct the work as to sacrifice the best interests of such work or drainage. They may determine that the method of drainage shall be by removing obstructions from a natural or artificial watercourse; or diverting such watercourse from its channel, by deepening, widening or changing the channel of such watercourse; by constructing an artificial channel, with or without arms or branches; by providing that said work may be the tiling of an already existing public open drain or tiling an already existing public open drain and constructing as a part of said work a new drain; by providing that such drain shall be open or tiled and covered, or partly opened and partly tiled and dug by shovel, dredge or otherwise; by constructing levees or dykes; or by any or all of such methods combined: *Provided,* That all timber, shrubs and trees standing within twenty-five feet of any tiled part of any public drain, or of any public tile drain shall be removed by the owner of the lands on which such timber, shrubs and trees are located: *Provided,* That such drain shall not be located so close to any lake covering ten acres or more of ground as to lower the water level of the lake, and shall at no point be nearer than forty rods to the high water mark of such lake. "Excepting only where such drains empty into such lakes." Any two of such commissioners may act without the presence or concurrence of the third. The county surveyor shall be the engineer, if entirely disinterested and competent; otherwise the court shall appoint a disinterested and competent engineer who shall make the necessary surveys, and shall preserve in his office and

shall turn over to his successor legible copies of all notes made by him in the discharge of his duties: *Provided,* That in case the county surveyor shall not be a civil engineer or is incompetent, or shall fail to give the bond required, the court may designate some competent civil engineer to act instead of the surveyor, who shall, before entering upon his duties, take and subscribe an oath of office, and give bond as herein required of the county surveyor: *And, provided further,* That in all cases where lands are named in said report as affected by such proposed work, which are not named in the petition, the court shall fix a time for hearing the report, and it shall be the duty of the petitioners, at their own cost, to give ten days' notice to the owners of such lands of the filing of such report in the same manner as is herein required to be given of the filing and docketing of the petition, which notice shall state the time for hearing such report, and in such case the court shall continue the hearing of said entire report until such notice has been given as last above provided. The same proceedings shall be had in regard to such report as if all the lands mentioned therein, and the owners thereof, had been named in the original notice of the filing of the petition, and in locating and fixing the size and dimension of drains and ditches, they shall provide ample means for the drainage or protection from overflow of the land to be affected, having in view future contingencies, as well as the present. The drainage commissioners shall include in their report an itemized account of the costs and expenses incurred in making the survey and assessments, and the completing and filing of their report.

Remonstrance—Damages—Assessments—Trial—Order.

SEC. 4. Remonstrance—Damages—Assessments—Trial—Order.—Upon the making of such report to the court, ten days, exclusive of the day of filing such report and Sundays, shall be allowed to any owner of lands affected by the work proposed and reported benefited or damaged, to remonstrate against the report; the remonstrance shall be verified by the owner of the land or by some person on his or her behalf, and may be for any of the following causes:

First. That the report of the commissioners is not according to law.

Second. By any person or persons whose lands are

assessed as benefited, that the damages assessed to any specified tract of land are exorbitant.

Third. By any person or persons whose lands are assessed as benefited, that his or their specified lands are assessed too much as compared with other lands assessed as benefited or damaged, specifying the same.

Fourth. By any person or persons whose lands are assessed as benefited, that other tracts, specifying the same, are assessed too low according to the benefits to be received.

Fifth. By any person whose lands are assessed as benefited, that the same will not be affected, nor benefited to the extent of the assessment by the proposed work if accomplished.

Sixth. By any person whose lands are assessed as damaged, that the damages assessed are inadequate.

Seventh. By any person whose lands are reported as benefited, that his lands will be damaged by the construction of the proposed work.

Eighth. That it will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits.

Ninth. That the proposed work will neither improve the public health nor benefit any public highway of the county, nor be of public utility.

Tenth. That the proposed work as decided upon and reported by the commissioners, will not be sufficient to properly drain the land to be affected, and the filing of such remonstrance in the office of the clerk of such circuit court shall be a sufficient filing thereof under this act whether in term time or vacation.

If, upon hearing, the court shall decide that the first of the above causes of remonstrance is true, the court may direct the commissioners to amend and perfect their report, or the court may in its discretion set aside said report, refer the matter anew back to said commissioners for a new report. In making such order for a new report, the court shall fix the time and place of their meeting, and when they shall report; and when said new report is made and filed, any person whose lands are reported as affected may remonstrate within the same time therefrom and for the same causes as is hereby allowed to remonstrate against the first report, but such second remonstrance shall only be as to new matters contained in the second, or amended report. All questions of

facts arising on the petition, report or remonstrance, shall be tried by the court without a jury. If the remonstrance or remonstrances shall be sustained by the court on the second, third, fourth, fifth, sixth or seventh causes of remonstrance, the court may modify and equalize the assessments as justice may require by diminishing the assessments on some tracts and increasing it on others, or by giving or withholding damages, and for such purposes all persons whose lands are reported as affected, or are stated in the petition as affected, shall be deemed to be in court, by virtue of the notices originally given to such parties of the pendency of the petition, or by the notices subsequently given to the owners of lands which were not in the original petition, but brought in by the action of the commissioners; and if lands described in the petition as affected by the proposed work, and the commissioners have reported such lands as neither benefited nor damaged, the court may, if the facts and justice shall warrant it, make assessments against the same, and as such assessments are so changed, modified and equalized, or made, they shall stand and be adjudged valid. If the finding and judgment of the court be against the remonstrance or remonstrances on the second, third, fourth, fifth, sixth and seventh causes as above set out, the assessments made by the commissioners shall be confirmed, and the order of confirming shall be final and conclusive. If the finding and judgment of the court be in support of the remonstrance or remonstrances on the eighth, ninth or tenth causes of remonstrance, the proceedings shall be dismissed, at the cost of the petitioners, including the costs and per diem of the commissioners, reasonable fees for the services of petitioners' attorneys, all court costs and the costs of the trial of the remonstrances. If there be no remonstrance, or, if the finding and judgment shall be in all respects against the remonstrance for the first, eighth, ninth and tenth causes of the remonstrance, or if for the second, third, fourth, fifth, sixth or seventh causes of remonstrance, the court can and does equalize the same as above provided, the court shall make an order declaring the proposed work established, and approving assessments as made by the commissioners, or as equalized and modified as above provided for, and shall assign the same to one of the three commissioners above provided for, for construction, or the court may assign it for construction to any disinterested freeholder of the

county, who shall, before entering upon his duties, take and subscribe an oath of office, and give bond, payable to the State of Indiana, in such sum as the court may require, conditioned that he will honestly and faithfully perform his duties and account for all moneys that may come into his hands. When the finding and judgment of the court is against the remonstrance for any cause, or when in his, her or their favor on the second, third, fourth, fifth, sixth or seventh causes, and the assessments or benefits or damages to the person remonstrating is not changed ten per cent. in favor of the remonstrant, he shall pay the costs occasioned by his remonstrance, and in all other cases the costs shall be paid by the petitioner. In all cases of appeal tried in the circuit court, and in all trials in that court, provided for in this act, the trial shall be by the court, without a jury. There shall be no change of venue from the county. The order of the court approving and confirming the assessments, and declaring the proposed work of drainage established shall be final and conclusive, unless an appeal therefrom to the supreme court be taken and an appeal bond filed within thirty days, to the approval of the court or the clerk in vacation. A transcript of the record on such appeal and all bills of exceptions shall be filed in the office of the clerk of the supreme court within sixty days after the filing of the appeal bond. All parties shall take notice of, and be bound by such appeal, and all proceedings in the matter of such drainage shall be stayed until its determination.

Constructing Drain—Collecting Assessments.

SEC. 5. Constructing Drain—Collecting Assessments. —The commissioner or other person charged with the execution of the work, as above provided for, shall proceed to have the same constructed. He shall pay the costs not otherwise adjudged and all expenses incident to the construction of such work, including reasonable attorney's fees of the petitioner in the preparation and presentation of the petition, and the prosecution of the same and for such services as may be necessary in any stage of the proceedings not exceeding four per cent. of the assessed benefits as approved by the court in all drains in which the assessed benefits are greater than one thousand dollars ($1,000), the costs of giving notice, and shall pay such other costs and expenses as the court shall

deem proper out of the funds collected from the assessments made and confirmed as aforesaid: *Provided,* That no claim for costs, expenses or otherwise, except on contract for constructing the work, shall be paid until it is presented to the court, and by the court allowed. He shall pay into the county treasury, as soon as he may collect from the assessments sufficient for the purpose, whatever that sum shall have been by the provisions of this law paid out of the county treasury on account of such work. He shall also pay all damages that have been assessed and allowed by the court and the cost of constructing the work. He shall, for the purpose of raising funds for the above mentioned purposes, collect pro rata of the assessments of benefits reported by the drainage commissioners, and as adjusted by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract, and not to exceed its pro rata share where the total amount of all assessments is not required for such payments, and require the same to be paid in installments not exceeding ten per cent. per month, at such times as he shall fix after thirty days' notice thereof, by one publication in a newspaper published in the county in which such lands are located, which notice shall state when and where all such installments shall be payable. He shall divide such work into stations not exceeding one hundred feet in length, and provide himself with and furnish on demand to any person interested or to any one proposing to bid on such work, the computation of the number of cubic yards of excavation in each station as is above provided for; and shall, after giving notice for two weeks in a newspaper of general circulation in each county where lands assessed as benefited are situated, proceed to let such work by contract to the lowest and best bidder. He may let the work as a whole, or subdivide the same into two or more sections and let the same in separate contracts, as will in his best judgment the most speedily and economically accomplish its completion: *Provided,* That any person, against whose lands assessments of benefits have been made, shall have the preference, at the same rate, over any other contractor. Such contractor shall, within the time, which shall be reasonable, and which, for good cause, may be extended under the direction of the person charged with the construction of such work, construct such part of such work so

set off to him: *Provided,* That should any such person fail or refuse to construct such portion of said work so contracted to him within the time according to the specifications, and should it become manifest, before the expiration of such time, that such person would not complete the same, or would be unable to complete the same within the time limited, or in the manner specified, then the person charged with the construction of such work may annul such contract and let the same to the best bidder, first giving ten days' notice by the publication in a newspaper published in the county in which that part of such work lies: *Provided,* Such person so in default shall not again become a bidder for such portion of such work, but such person shall be allowed on his contract a fair price for the work he has performed up to the time his contract is so annulled, such price to be determined by the court establishing said work. If such person to whom an allotment of work is contracted, be the owner of lands assessed for benefits, and shall perform his work within the time specified, the price thereof shall be applied on his assessment, and the same shall not be collected of him as above provided: *Provided, further,* That any person or party who shall have successfully bid for the whole or any part of said work, shall, when the same is so set off to him, enter into a contract with the person in charge to perform such part of such work and give bond and surety, and in a proper penalty, for the performance of his contract, and that he will pay all damages occasioned by his nonfulfillment of his said contract, which may be recovered in any court of competent jurisdiction. And in case any person or party whose lands are assessed for the construction of such ditch shall be damaged by reason of such default and failure of such contractor to complete the work within the time limited, such contractor so in default shall be liable on his bond to the person or party so damaged to the full amount of such damages, which may be recovered in any court of competent jurisdiction in a suit or an action on such bond by the State of Indiana on the relation of the person or party damaged for the use of such person or party injured or damaged, and the amount recovered shall be paid to the party injured, and such superintendent of construction may bring suit on such bond in any court of competent jurisdiction to recover any increase cost, expense or damages of or to the work

by reason of such failure of such contractor, and the amount recovered shall be and become a part of the funds in the hands of such superintendent, for the construction of such work, the same as assessments. He shall collect the assessments not satisfied, as herein provided for, or such part thereof as may be by him deemed necessary for the purposes herein mentioned, and apply the same as herein provided, and for the purpose of making such collections, if not paid as above required, he shall make his certificate, showing the amount of such assessments against any tract or tracts of land, the default in its payment as required, and file the same with the auditor of the county where such lands are situated, and thereupon the auditor shall place the same on the delinquent tax duplicate, and the same shall be collected as other delinquent state and county taxes are collected: *Provided,* Personal property or real estate other than that assessed as benefited, shall not be sold therefor: *Provided,* That in all sales of real estate made by the treasurer of any county under the provisions of this act, the owner thereof, or any person having an interest therein or lien thereon, at the time of sale, shall have the right to redeem the same at any time within two years from the date of sale, by paying into the county treasury, for the benefit of the purchaser at such sale, the amount for which said land was sold, together with a penalty of fifteen per centum per annum for such time as may have elapsed from the date of sale until the time of such redemption. But in no event shall the total compensation of such surveyor and his necessary assistants, be greater than a sum equal to four (4) per cent. of the actual cost of excavation of any drain whose total cost of excavation shall exceed three thousand dollars ($3,000). Such, and any and all bills for services of such surveyor and his assistants shall be first approved and allowed by the judge of the circuit court of the county where such proceedings shall have been commenced, and shall be paid out of the fund raised for the construction of such ditch and not otherwise.

Drainage Bonds—Request—Agreement—Assessment.

SEC. 5¼. In all cases where the contract price for the construction of any work of drainage, as provided for in this act, shall exceed the sum of five thousand dollars, drainage bonds may be issued to procure funds for the

payment of the costs of such construction, provided the owners of two-thirds in acreage of the lands assessed for benefits shall within sixty days from the establishment of the work and approval of the assessments of benefits and damages file their written request therefor with the superintendent of construction. In such written request such land owners shall agree that in consideration of the right to pay his assessment in ten yearly installments, he will not make any objection to any illegality or irregularity, if any, in the proceedings up to, and including the letting of the contract and the issuing of such bonds and he will pay such assessments with interest as the same become due. The filing of such requests and the issue of bonds, if any there should be, shall in no manner affect the collection of assessment from land owners and others assessed for benefits who have not filed requests for the issue of bonds, and as to them the collection of assessments provided for in the last section shall be made as if no bonds were issued; and bonds shall be issued to cover only so much of the cost of the work as is apportioned to the lands of those who have filed requests therefor, and shall be liens only on such lands and payable only out of the assessments made thereon. Such apportionment shall be made as follows: The superintendent of construction shall carefully ascertain the total original cost of the work of drainage including all damages awarded to the owners of lands and all incidental expenses and shall apportion such total cost and expenses to the several tracts of land and parties assessed for benefits in proportion to the assessments for benefits not in any case exceeding such benefits. Thereupon, the superintendent shall report all such facts to the court in term time or the judge thereof in vacation; together with all such requests for bonds and waivers of irregularities by land owners, which report the court or judge shall examine, and, if found correct, shall approve, whereupon such report and requests and waivers, with such approval, shall be entered in full in the order book of the court, and a certified copy of such entry shall be made by the clerk and delivered to the auditor of each county in which lands are located for which the owners have requested the issue of bonds, which certified copies shall be filed by such auditors and laid before their respective boards of commissioners, at such ensuing session. Each board of commissioners, at such ensuing monthly session

after filing of such transcript, shall direct the county auditor to prepare an assessment sheet or drainage duplicate showing the total amount of costs apportioned to all the parcels of land for which the owners request the issue of bonds, with proper columns for the payment of installments and interest. And such auditor shall assess ratably from year to year upon such lands a sum sufficient to pay such bonds and interest as they severally mature. The first of such assessments shall be due and payable at the semi-annual payment of taxes next following the letting of the contract, and the remaining assessments on the same day each year thereafter for nine successive years, with interest at six per cent. per annum, payable semi-annually, on all unpaid assessments. Such assessments and interest shall be collected by the county treasurer as state and county taxes are collected, and shall be subject to the same penalties in case of nonpayment when due; and all laws for the collection of delinquent taxes and for the sale of lands for taxes and redemption from sale shall apply equally to the collection of such assessments. Any land owner desiring to relieve his lands of the lien of such costs of drainage, may at any time pay the whole amount of unpaid installments with all interest to accrue thereon until the maturity of such bonds respectively. The treasurer shall receipt for any payment on such installments and mark such payment on the duplicate, as in the case of payment of taxes; and any such payment shall be a release of the lien of such cost and of the assessment for such drainage to the extent of such payment. As soon as such drainage duplicate is so prepared, the board of county commissioners of each county shall issue the bonds of the county to the amount of the cost of drainage so placed upon the duplicate for collection in such county. The bonds shall be numbered consecutively and shall be in denominations of one hundred dollars or any multiple thereof, except that one bond may be for less than one hundred dollars. One-tenth of such bonds as near as may be, shall fall due and be payable on the first day of June or December, as the case may be, following the next succeeding semi-annual payment of taxes, and one-tenth of such bonds, as near as may be, shall fall due on the same day every year thereafter, for nine successive years. All such bonds shall bear interest from the date of letting the contract for such drainage until the bonds

are paid, respectively, at six per cent per annum, payable semi-annually on the first day of June and the first day of December each year. They shall show on their face for what purpose they are issued, and shall be payable out of collections made on such bonded assessments and not otherwise. Upon the signing of such bonds by the county commissioners and attestation thereof by the county auditor, they shall be turned over to the county treasurer, who shall receipt to the auditor therefor. Thereupon, the treasurer shall give notice by publication once in a newspaper of general circulation published in the county, and by posting a copy of such notice at the door of the court house, that at the office of such county treasurer, on and after the hour of ten o'clock a. m. on a day to be named not less than twenty days thereafter, the treasurer will proceed to sell such bonds at not less than their par value to the highest and best bidder for cash: *Provided, however,* That in lieu of selling such bonds, as herein provided, the county commissioners by order of record to that effect, may direct that the bonds shall be exchanged at par and held by the county treasurer for any unloaned school funds as other unused funds held in the county treasurer [treasury]; in which case, the assessment and interest collected for the payment of such bonds shall be paid into and credited to the fund so used in their purchase. The proceeds of such bonds shall be drawn out of the county treasurer [treasury] only on the warrant of the auditor upon the certificate of such drainage commissioner in payment of the costs of construction and expenses incident thereto. In case the bonds sell at a premium, the aggregate amount of such premium shall be apportioned pro rata to the several assessments which are bonded and the amount thus apportioned to each parcel shall operate as a payment to that extent of the first maturing installment.

Lien—Notice—Recording—Satisfaction.

SEC. 6. Lien—Notice—Recording—Satisfaction.—The filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners locating the work and fixing the amount of assessments shall be deemed notice of the pendency of the proceedings to all persons whose lands are named

therein and not named in the original petition, and the amount of the so assessed from the time the same are approved and con-assessments as made or approved and confirmed by the court, shall be a lien first and paramount upon the lands firmed. The commissioners charged with the construction of the work shall, as soon as may be after he has been directed to construct the work, make out a notice wherein he shall state that the work has been established by the court; also the several assessments to the several tracts of land as the same have been finally confirmed by the court, and cause the same to be recorded in the office of the recorder of each county where any such lands may be situated. Whenever the assessments against any tract of land shall have been paid in money, or satisfied by the construction of a portion of said work as in [is] provided for in section 5 of this act, it shall be the duty of the commissioner or person charged with the construction of such work, within thirty days from the time of such payment or satisfaction, to enter satisfaction of such lien upon the margin of the page where such assessments are recorded, or if this be impracticable for want of room, then on some other page of the same or other record, reference being made thereto by marginal note on the page where such assessment is recorded. This provision shall apply to all drainage commissioners appointed under this act, and also to all commissioners of drainage in charge of work established under any former law of this state.

Account—Report—Suits—Liens—Compensation.

SEC. 7. Account—Report—Suits—Liens.—Such commissioners shall keep an accurate account of all work or material received or moneys collected by him on account of any and all assessments, and of all payments made on account of the work intrusted to him, and shall take vouchers for such payment. He shall also keep an exact account of the time occupied by him in the performance of his duties. Whenever he shall be engaged on two or more works on the same day, he shall divide such day among them in proportion to the time devoted to each. He shall as often as once in six months make a full report of such matters under oath, to the court; and the court shall allow him for his services not exceeding three dollars per day for the time actually and necessarily employed; but in no event shall the compensation paid to

such drainage commissioner be greater than a sum equal to three per cent. of the total cost of such excavation of such drain, except on drains where the total cost of excavation shall be less than three thousand ($3,000) dollars; he shall at all times be under the control and direction of the court, and shall obey such directions; and for failure so to do shall forfeit his compensation and be dealt with summarily as for contempt, and may also be removed from office by the court. Suit may also be brought upon his bond in the name of the state, and the amount recovered shall be applied to the construction of the work. The court may at any time, when the occasion may require, direct another one of the commissioners to proceed with the construction of the work, and may at any time discharge therefrom the commissioner appointed thereto. All laborers and other persons who shall hereafter perform any labor or other service, or furnish board or any materials in the construction of any work under the provisions of this act shall have a lien upon the fund raised for the payment of the same; and upon notice in writing filed with the person whose duty it shall be to pay out such fund, of the amount due and what the same is for, such person shall withhold payment to the contractor for such work to an amount sufficient to satisfy such lien until the same is adjusted and paid; and in case of disagreement between the contractor and the person claiming such lien as to the amount or validity thereof, the court ordering the construction thereof shall, upon motion of the commissioner, the contractor, or the person claiming such lien, determine such matter; and upon failure to comply with the above provisions, such person in charge of such work shall be liable on his bond for the amount improperly paid over to such contractor: *And provided, further,* That none of the provisions of this act shall apply to proceedings instituted prior to the passage of this act.

Act Construed—Supplemental Petition.

Sec. 8. Act Construed—Supplemental Petition.—This act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands, and collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries, but such judgment

shall be conclusive and final, that all prior proceedings were regular and according to law, nor shall any person be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby. Any person interested may file with the court a supplemental petition showing that lands not mentioned in the original report are affected, as he believes, by such drainage, in which case the court shall require such person to give such notice as it may deem proper and sufficient to the persons affected thereby, and shall refer the same to the drainage commissioners for a report, and any and all proceedings may be had thereon, and orders and decrees made therein, the same as if it were an original petition, but the proceedings thereon shall not affect the original petition, unless the court shall, for good reason, order the same consolidated and made a part of the original petition, in which case the court may make such orders therein as are herein authorized.

Drains on State Lines.

SEC. 8½. Whenever it may be desirable to construct, widen, deepen, straighten or change any ditch, drain or water course lying on, along, across or near to the state line between the State of Indiana and any adjoining state, or whenever it may be desirable to construct, repair or improve any work of drainage as provided for in this act, which ditch, drain, water course or other work of drainage can not be constructed, repaired or improved in the best manner without affecting lands in such adjoining state, the boards of commissioners and other proper officers of the several counties in this state, so adjoining another state, shall have authority to join with the proper officers of such adjacent counties of other states in the construction, widening, deepening, straightening, repairing or improving of any such ditch, drain, water course, or other work of drainage. Such commissioners of such counties in this state are given powers jointly to enter into contracts with the proper officers of such counties in adjoining states to construct, repair or improve any such work of drainage, each to pay such proportion of the costs and expenses of the work as by the contracting officials shall be deemed just. Such work of drainage shall be made on petition of land owners or corporations as provided for in this act and this act so

far as applicable shall govern the commissioners and other officers of this state in relation to joint work of drainage, provided such adjoining county or counties in other states shall pay their proper share of necessary costs and expenses.

Highways—Payment of Assessments.

SEC. 9. Highways—Payment of Assessments.—Any benefits assessed to any highway shall be assessed against the proper township, and shall be paid by the trustee out of the township fund belonging to such township. Assessments on account of improvements to streets and alleys in incorporated towns or cities shall be against such towns or cities.

Repairs—Obstructions—Township Trustee.

SEC. 10. Repairs—Obstructions—Township Trustee. —That all ditches or drains that may have been, or may hereafter be, constructed under and by virtue of any law of this state, shall, except as hereinafter otherwise provided, after the allotment shall be made by the county surveyor as hereinafter provided, be under the charge and supervision of the trustee of the township in which the same are a part thereof, whose duty it shall be to see that the same are cleaned out and kept open and in proper repair, free from obstruction, so as to answer their purpose.

Allotment—County Surveyor's Duties.

SEC. 11. Allotment—County Surveyor's Duties.—As soon as practicable, after the passage of this act, it shall be the duty of the county surveyor in each county in this state in which any such ditch or drain, or part thereof, is located when ordered by the trustee of the township in which some part of such ditch is located, to proceed to view and examine each and every such ditch or drain within his respective county, except dredged ditches, and to fix and determine the portion thereof that the owner of each tract of land and each corporation, county or township assessed for the construction thereof should biennially clean out and keep in repair, and shall also at the same time set apart and apportion to each parcel of land, and to each corporate road or railroad, and to the township where public highways are benefited, a share or portion of such ditch or drain, according to the benefits to be received thereby, to be

cleaned out biennially and kept in repair by the owner of each tract of land, or by such corporate road or railroad, or by the township. Such surveyor shall, whenever practicable, locate such share or portion of such ditch upon such tract of land, or upon the right of way of such corporate road or railroad, or on the highway, on account of which such share is allotted to the township. In making such allotments such surveyor shall begin at the mouth of the ditch where he shall fix a permanent mark or monument of the place of beginning, and he shall also establish a permanent mark or monument at the upper end of each allotment, and give the location of each share, its number and length in feet, and a brief description of the manner in which the work shall be done. Each ditch or drain shall be cleaned out to a depth and width not less than its original specifications: *Provided,* That where ditches were originally allotted for construction by reviewers appointed by the board of county commissioners, under any former law, the allotments shall remain the same for repair under this act, unless a majority of the parties assessed shall petition the surveyor or the trustee shall request in writing a reapportionment under the provisions of this act, in which event the same proceedings shall be had as in other cases. The allotment shall describe the land in such tracts as may meet the convenience of owners, and in case of a subsequent subdivision of such tracts the allotment may be subdivided by contract, and the duties prescribed under this act pass to grantees: *Provided,* That where any person or persons shall have converted that portion of said ditch running through his or their lands or part thereof into a blind ditch by putting in drain tile of sufficient dimensions to serve the purpose of drainage, said drain tile so put in being continuous from the head or beginning of such ditch through the land of said owner or owners, and thus obviating the necessity of working that part of said ditch so tiled of said ditch on his or their lands, said tiling shall be taken in consideration in making said allotments, and the allotments herein provided shall be made among the land owners, roads or railroads only through whose lands such ditch is open; and where allotments have been made to include land or lands through which such blind ditch or tiling forms a part of said open ditch, the owner or owners receiving due credit for the allotments so tiled. The

owners of the land through which an open ditch runs shall remove all brush and weeds from the banks of that part of the ditch through the lands, owned by them respectively, during the month of July in each year; and shall be given credit for such work in making allotments for the repair of such ditches.

Record of Allotments—Notice.

SEC. 12. Record of Allotments—Notice.—Such surveyor shall reduce such allotments to writing, and after the same are finally fixed and established he shall record the same in a book to be kept for that purpose, and known as the drainage record. He shall thereupon cause to be posted up, for not less than ten days, in five public places in the township where lands are allotted a portion of said work, written or printed notices of the place where and the time when he will hear all objections that may be made to such allotments, which notice may be in substance as follows:

To whom it may concern:

You are hereby notified that I will be at my office on the ..... day of ....., 19..., at the hour of ...., and will then and there hear all objections that may be made to my allotment for cleaning out biennially and keeping in repair the ..... ditch, in ..... township, ... county, Indiana, when and where you can appear and be heard if you see fit.

.....
County Surveyor.

Dated this ..... day of ....., 19....

A copy of said notice shall also be sent by mail to the trustee of the township in which an allotment is made by reason of any highway, and to each individual whose lands are allotted portions of work, and to an officer of each corporation, and to a station agent of each railroad whom portions of said work has been allotted. Where the residence of any nonresident owner of such land is known to the surveyor, he shall send a copy of such notice by mail to such nonresident. If a nonresident owner of land have a known agent in the county a copy of said notice shall be mailed to such agent.

Hearing Objections—Order.

SEC. 13. Hearing Objections—Order.—Upon the day named in such notice such surveyor shall be present at the

time and place therein mentioned, and shall hear all objections made to such allotments, and shall have power to administer oaths to all persons examined before or by him. He may adjourn the hearing from day to day, or from time to time, as may be deemed necessary, until all objections are heard. All persons interested shall take notice of such adjournment without further notice. After hearing all objections that may be offered to such allotments, such surveyor shall confirm or change the same as justice may require, and shall enter an order accordingly, which shall be final and conclusive upon all parties interested, unless appealed from in ten days thereafter.

Appeal—Notice—Costs.

SEC. 14. Appeal—Notice—Costs.—Any person or corporation aggrieved may appeal from such order to the circuit or superior court of the county by filing with the clerk of said court, within ten days from the time of such order, an undertaking conditional that he will duly prosecute such appeal and pay all costs that may be adjudged against him on such appeal, such surety to be approved by said clerk; whereupon such clerk shall issue a notice in the nature of a summons to such surveyor, which shall be served by the sheriff of said county, and thereupon such surveyor shall file with such clerk a copy of the record of such allotments and the objection of the appellant thereto, which shall be all the proceedings necessary upon such appeal. All other persons interested shall take notice of such appeal, which shall be tried by the court. If the court reduce the allotment one-fifth in amount then all costs occasioned by such appeals shall be taxed against such surveyor, and paid out of the general funds in the country treasury not otherwise appropriated, otherwise the costs shall be adjudged against the appellant. If more than one person appeal separately the cases shall be consolidated and tried together. The court may confirm the allotment made by the surveyor or change the same, and its decision upon such appeal shall be final and conclusive. The surveyor shall receive for his actual services in alloting any such ditch for repairs four dollars per day and not to exceed two dollars per day for the services of each deputy surveyor, and the same rate for parts of days, to be paid out of any money in the county treasury not otherwise apportioned,

upon a report on oath filed with the county auditor, but in cases wherein it is necessary to employ a civil engineer to act in such capacity as a deputy surveyor, then such deputy shall be paid at the rate of not to exceed four dollars per day for the time actually employed: *Provided,* That the total amount to be allowed to such surveyor for the services of himself and his necessary assistants shall not exceed the sum of ten ($10) dollars for each mile of any ditch or drain so allotted by him.

Cleaning and Keeping in Repair—Trustee—Duties.

SEC. 15. Cleaning and Keeping in Repair—Trustee Duties.—It shall be the duty of the township trustee to procure a transcript of the surveyor's record of allotments of ditches in his township as soon as practicable after the passage of this act or after the same has been made, and he shall biennially prior to the first day of August fix a time within which each allotment on every ditch shall be cleaned out and put in repair by the person whose duty it shall be to perform said work; in fixing such time for the cleaning out of such allotment such trustee shall begin with the allotment nearest to the mouth of any such ditch, and proceed in regular succession up stream to the beginning of such ditch. He shall notify owners of allotments in sections of not less than one mile in continuous length of the ditch to have their respective allotments cleaned and ready for inspection at one and the same time and may, in his discretion, notify a greater number, or even all the owners of allotments to be completed and ready for inspection on the same day, and any person who shall permit or allow any earth, sand or material from an uncleaned allotment to wash down, in or upon, or in any [way] fill or impair any allotment which is clean, shall remove the same at his own cost, and on failure so to do, the trustee shall cause the same to be removed at the cost of the party so in default and such trustee may recover such cost before a justice of the peace or any court of record in a suit brought by him against the person so in default, or he may certify the amount of such cost and expense to the auditor of the county, who shall place the same upon the next tax duplicate against the land of the party so in default and the same shall be collected the same as assessments are collected. He shall make a record of the time so fixed by him for the completion of each allot-

ment on every such ditch separately in a book provided for that purpose. That on or before a day fixed by said trustee for that purpose, the owner of the land allotted shall appear before the trustee and declare his intention to clean or repair his said allotment and shall execute and deliver to said trustee an undertaking in such sum as the trustee shall fix providing for the completion of said work within the time specified and according to the original specifications. That prior to the first day of August, of every second year in which such ditch is to be cleaned or repaired, notice shall be given to the owner or occupant of each tract of land on which allotments have been made, which notice may be served by the trustee or other competent person, or mailed to his address by registered letter. Such notice shall be sufficient if it name the ditch, the owner of the land, describe the allotment, specify the time within which the allotment shall be completed, and the time at which the owner shall appear and declare his intention to perform said work and file undertaking for the completion of the same. That immediately after the day fixed for the filing of the undertaking by the owner of the land allotted, said trustee shall give ten days' notice by posting three notices in five public places within the township, describing each allotment in which an undertaking by the owner has not been filed, and after ten days sell the same for construction to the best responsible bidder, taking bond from the contractor for the faithful performance and completion of said work: *Provided,* Said trustee may cause said allotments in which owner of land has not filed bond, completed without sale, where in his judgment it can be accomplished in a cheaper manner.

Completion of Allotment—Failure—Costs.

SEC. 16. It shall be the duty of every owner of land or corporation who has filed a written undertaking for the completion of any allotment, to perform the same within the time fixed, and on failure so to do the trustee shall proceed at once to have the same completed, and the costs thereof together with the costs for the completing of the other allotments including his own per diem certified to the auditor of the county, who shall place the same on the tax duplicate as other taxes against such person or corporation to be collected as other taxes are collected, and when collected the same to be paid over

to such trustee, or such trustee may recover such expenses and his fees before any justice of the peace of the township where the owner resides, or through or into which such road or railroad runs; or he may bring suit in the circuit court or superior court of the county to collect such expense and fees, and enforce and foreclose the lien on such land, township or railroad, and he may bring suit in the circuit or superior court of the county upon any undertaking or upon the bond of any contractor for any breach thereof, and the amount recovered shall be paid into the township fund of such township, and in all suits brought by the trustee under the provisions of this act such trustee shall also recover reasonable attorney fees and the judgment shall be without relief from valuation or appraisement laws: *Provided*, That prior to the first day of August, in any year, in which a ditch shall be cleaned, the trustee may by the assistance of a surveyor or otherwise ascertain the grade line and the cubic yards of earth to be removed, and when said work is completed said trustee may have the same accepted by a competent surveyor. And the service of the surveyor and giving of notice shall be paid by the township.

Petition to County Commissioners—Proceedings.

SEC. 17. Petition to County Commissioners—Proceedings.—When any proposed work of drainage and the lands, highways, easements, public grounds and cities, towns or townships to be affected thereby are wholly within one county the petitioner [or] petitioners for such drainage, instead of applying for the same to the circuit or superior court as provided for in this act, may apply thereto by petition to the board of commissioners of such county at any regular monthly session of such board, and all provisions hereinbefore made as to such petitions, notice of the hearing, demurrer, pleading or motion in relation thereto, hearing thereof, dismissal or amendment of the petition and references to the drainage commissioners, remonstrance and exceptions thereto and action and ruling therein; action on such report, allowance and payment of claims, and all other matter in relation to such work, shall be had and concluded as far as applicable by and under direction of such board of county commissioners, as hereinbefore in this act provided for in the circuit or superior court, except as provided for in this

section. Appeal from the action of the county board on the report of the drainage commissioners may be taken to the circuit or superior court of the county within the time and in the manner provided in case of appeal from the action of the circuit court or superior court to the supreme court, and a like appeal, taken within like time and in like manner, may be had to the supreme court from the decision of the circuit or superior court on the appeal from the board. The reports of the drainage commissioners shall be prima facie evidence of the facts stated in such reports, whether before the board of commissioners, in the circuit or superior court or the supreme court. The county auditor, in case of the filing of a petition for drainage before the county board, shall perform all the duties provided to be performed by the clerk of the circuit court and the board of commissioners, in case of the filing of such petition before the board, is given all the powers required to perform all the duties in regard to such work of drainage, so far as the same is applicable that have hereinbefore been prescribed for the circuit or superior court save and except such board shall have no jurisdiction over any work or drainage where any part thereof or any lands to be affected thereby are situated in another county: *Provided*, That when objections, demurrers, remonstrances, pleadings and reports are to be filed within certain fixed time, the same may be heard by the board at the next term of such commissioners' court. Whenever it shall appear by the statements in a petition for drainage filed under provisions of this section, that the same if constructed will not, with all its branches, exceed two miles in length, and will not cost to exceed three hundred dollars, exclusive of the tile that may be used therein, and that the surveyor of the county is not interested therein, or related to the parties likely to be affected thereby, the auditor of the county shall refer the same at once to the surveyor of the county, and it shall be his duty to investigate and report therein to the auditor of such county within thirty days, and in so doing he shall perform and have all the duties and powers granted by this act to engineers, drainage commissioners and viewers in drainage proceedings. Upon the filing of such report, the auditor shall issue a notice to each landowner named therein, in which he shall set forth in proper blanks:

First: A general description of the route of said ditch.

Second: The names of the land owners named therein.

Third: A general description of such owner's land and the amount such land is assessed for benefits or damages.

Fourth: The day when the same will be heard by the board of commissioners, which shall be at the next ditch day, by the rules of such board that it is not less than fifteen days after such report is filed with the auditor.

If the petitioner ask to serve such notices he may do so, but if he fails to call within three days after the filing of such report therefor or if he fails to serve the same, they shall be delivered to the sheriff of the county where such land owners reside, and such sheriff shall immediately serve the same as summons is served in civil actions, the cost thereof to be taxed to the petitioner as a part of the expense to be paid by him in said matter. Upon the day set for the hearing, if the board of commissioners find that all persons named in said report have been notified thereof more than ten days prior to such day, they shall proceed to hear the same, and in so doing shall have power to hear and determine said matter the same as is granted in such proceedings in the circuit court and make such changes in plan of said work and to change and modify the assessments of benefits and damages as is granted to said court in this act. And every land owner shall have the right, and it shall be his duty, to file such objection thereto as might or could be done in such proceedings in the other sections of this act. If any land owner shall be dissatisfied with the judgment of such board, he shall have the right to appeal therefrom in the same manner that appeals are taken from other decisions of such board; and the court to which such appeal is taken shall have the power to hear and determine such matters as if it originated in such court. At all of such hearings the report of the surveyor shall be evidence of the fact therein stated, and the burden of changing such report shall be upon the remonstrant. Such ditch shall be constructed and repaired in the same manner as in the act provided for the construction and repair of other ditches. If it shall appear to the board that notice has not been given to all persons affected as hereunto provided, the hearing

of such matter shall be continued till they have received notice when such matter shall be heard, and if it appears by affidavit at any time that any land owner is a nonresident of the state, or his residence is unknown, the auditor of said county shall give notice of such matter in the same way and for the same time that notices are given to nonresidents in civil actions in the circuit court.

Obstructions.

SEC. 18. That the owner of inclosed land through which any allotted ditch may run, shall be liable to the trustee for any obstructions caused by cattle or stock, and upon notice from the trustee, the owner of said land shall immediately remove such obstruction, and if not so removed, the trustee shall have said ditch repaired, and may sue such owner in any court having jurisdiction, and collect all expenses incurred in making any such repair, provided such expenses shall include the reasonable attorney's fees.

Tiling or Change—Petition—Proceedings.

SEC. 19. Should the owner of any land, or any corporation, affected by the construction, change, improvement or extension of any work of drainage under this or any former law of this state, be of the opinion that such work, or any part of it, may be more economically kept in repair, or may be made more efficient for its purpose, by tiling and covering; by removing tile and making the drain open; by changing the line of the drain or extending its length; or by making any other change in the work as originally constructed, such land owner or corporation may apply for such change, improvement or extension by filing a petition therefor with the circuit or superior court, or with the board of commissioners, as the case may be, of the county in which the proceedings were had for the construction of such work. The form and contents of such petition and other provisions in relation thereto shall, so far as applicable, be the same as provided in section two of this act for the original petition for the construction of the work; and the provisions of section three, as to notice and hearing of such petition or remonstrance thereto, reference thereof to the drainage commissioners; the provisions of sections three and four as to the report of the drainage commis-

sioners, exceptions thereto and action on such exceptions and on the report; and the provisions of section five and section seven as to the duties of the superintendent of construction, shall, so far as applicable, be the same in case of such change or improvement in such work of drainage as in case of the original construction of the work; and if such work of change or improvement is done under the direction of the circuit or superior court, and the total cost exceed five thousand dollars, the provisions of section six in relation to the issue of drainage bonds shall also apply. In all other respects the provisions of this act in relation to the construction of any work of drainage shall, so far as applicable, govern in the making of any such change, improvement or extension of any work constructed under this act or under any former drainage law of this state: *Provided,* That if the changes contemplated do not affect more than two miles of said ditch and will not cost to exceed three hundred dollars ($300.00) exclusive of tile to be used therein, then all the procedure and provisions in relation thereto may be had in accordance with the provisions of section 17 of this act: *Provided, further,* That if the drain which it is proposed to change in accordance with the method of procedure laid down in said section 17 of this act, was originally established in the circuit or superior court, then the clerk of such court shall proceed in all ways as would the auditor of the county in carrying out the provisions prescribed for him in said section 17.

When Surveyor May Repair.

SEC. 20. The repair of all drains or ditches other than dredge ditches, shall be in the hands of the township trustees in whose townships such ditches or any part thereof may be situate: *Provided,* That when not less than one-third of the persons whose lands are assessed upon any ditch, shall petition the trustee of such township or townships, such trustee shall turn the work of repair and supervision of any ditch mentioned in such petition over to the county surveyor, who shall proceed to repair and clean such ditch in the same manner that such work would be done under the provisions hereof for the cleaning of such ditches by township trustees: *And, provided,* That when any such trustee shall fail to perform any duty provided for him in this act, he shall be

guilty of a misdemeanor, and may be fined in any sum not less than $25 nor more than $100, in any court of competent jurisdiction.

Repeal—Exception.

SEC. 21. All laws and parts of laws heretofore enacted in relation to drainage are hereby repealed: *Provided,* Any pending proceedings shall be continued under this act, except that all proceedings which shall have been commenced under and in accordance with an act entitled "An act concerning drainage," approved March 6, 1905, shall be concluded and determined in accordance with all of the provisions of said act.

Fresh Water Lakes—Act Not Affected.

SEC. 22. Nothing in this act shall be taken to affect or repeal any part of an act entitled "An act to preserve the fresh water lakes of the State of Indiana at their established level and protect them from danger of being injuriously affected or destroyed by the lowering of the water thereof and providing penalties for violation thereof, and declaring an emergency;" approved March 6, 1905, the same being chapter 152 of the acts of 1905, but that this act shall be considered supplemental thereto: *Provided,* That this act shall not repeal any law enacted by the session of 1907 of the general assembly of the State of Indiana, but shall be supplemental thereto.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

REPLY BRIEF FOR APPELLANT.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

List of Cases Cited.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

REPLY BRIEF FOR APPELLANT.

It is our understanding that the only question now properly before this Court is one of jurisdiction, and that the merits of the case will not now be considered. If counsel for Appellee had not discussed the merits of the case in their brief and argument, we should not feel called upon to make any reply. Since they have done so, however, we do not feel justified in wholly ignoring their argument, and we therefore submit a reference to some authorities in support of Appellant's contentions upon the merits and a discussion of some of the cases cited by counsel for Appellee. Before doing so, however, we will reply briefly to counsel's argument upon the jurisdictional question.

JURISDICTIONAL QUESTION.

Nearly all of counsel's argument on this point is devoted to the proposition that a federal court may not enjoin proceedings in a state court at any stage of such proceedings. To the extent that such proceedings are *judicial in character* we do not controvert their proposition. This Court has, however, recognized a distinction in the character of proceedings pending in a state court. Some proceedings are distinctly judicial in character and may not be enjoined by a federal court. But other proceedings are legislative or executive or administrative in character, and such proceedings may be enjoined. The question, therefore, in this case is whether the act of the Circuit Court of Porter County in constructing the Burns Ditch, is a *judicial* proceeding or a *legislative, executive* or *administrative* proceeding. That is the main issue in this case. The authorities cited by counsel for Appellee do not bear particularly upon this issue. We respectfully submit that the principles announced by this Court in the rate cases cited by us in our brief are applicable to this case. In those cases this Court held that the nature of the final act must determine the nature of the proceedings leading up to that act. The act of constructing the Burns Ditch not being judicial, the decree establishing the ditch must likewise be held not to be judicial. That decree was a *legislative* act and the *fulfillment of that decree* by the construction of the ditch is an *executive or administrative act,* and as such may be enjoined by a federal court.

On page 38 of their argument counsel for Appellee cite *Boom Co.* v. *Patterson,* 98 U. S., 403, and *Union Pacific R. Co.* v. *Myers,* 115 U. S., 2, in support of the proposition that while a proceeding before commissioners appointed to appraise land to be taken by condemnation was in

the nature of an inquest, nevertheless, such proceeding became a suit at law when transferred by appeal to the District Court and was thencefore subject to its ordinary rules and incidents. They cite *County of Upshur* v. *Rich,* 135 U. S., 467, in support of the proposition that while a proceeding by administrative officers looking to the valuation of property for the purposes of taxation was not a suit, yet it did become a suit upon appeal to a court having jurisdiction to determine questions of law and fact, and they cite *In re Jarnecke Ditch,* 69 Fed., 161, in support of the proposition that a drainage proceeding in Indiana is a controversy in a state court in the nature of a civil suit.

We do not deny that in some respects the drainage proceeding in the Circuit Court of Porter County establishing the Burns Ditch is a judicial proceeding. On pages 10 and 11 of our argument we admit that fact. We contend, however, that the entry of the decree establishing the ditch is a legislative act of the Circuit Court of Porter County. Thereafter the construction of the ditch is a purely executive or administrative proceeding of the court, acting through Appellee. Counsel ignore entirely the dual capacity in which the state court acts. Under the Drainage Act the court is first called upon to ascertain whether the facts presented by the petitioning land owners in their petition, and subsequently by the Drainage Commissioners in their report, bring the case within the terms of the Drainage Law. The court must then investigate and ascertain what compensation must be paid to the owner whose land is taken for the proposed ditch and what proportion of the cost of the proposed drainage proceeding must be borne by the owner whose land will thereby be benefited. In so doing the court exercises its judicial functions. The court then enters

the decree establishing the ditch, and while the entry of the decree is the outcome of the judicial investigation, it is in nature a *legislative act*, since the court thereby *establishes the ditch*, just as the legislature itself might in the first instance have done by the passage of a special act. With the entry of the decree the adversary proceeding ended. (See cases cited on pages 11 and 12 of our original argument.)

From that time on the state court, in constructing the ditch through the agency of Appellee, exercises functions of an executive or administrative nature. Its duties thereafter are in no sense judicial. Rights of parties are not adjudicated unless a matter judicial in nature is specially brought before it as a judicial body, in which case of course it exercises its judicial functions. The difficulty in this case arises from the fact that the legislature has conferred upon the same body *judicial* as well as *executive or administrative* powers, and it is necessary to keep the distinction between these powers clearly in mind in deciding the issue presented. In its bill of complaint Appellant sought only to restrain Appellee from performing the purely executive or administrative act of constructing the ditch. In acting in that capacity either Appellant or the court itself may as properly be enjoined by a federal court as was the Virginia Commission in the rate cases.

Our case is not unlike that of a railroad company which proposes to extend its line. It institutes in a state court the necessary condemnation proceeding to acquire title for its proposed right of way, and upon the entry of the decree of condemnation such title is acquired. The actual building of its line over such right of way is in no sense a judicial act, and is in no way related to the condemnation proceeding in which it acquired title to such right of way. But if in constructing its line over such right

of way the company was about to deprive a citizen of any rights which were protected by the Constitution of the United States, can there be any doubt but that such citizen could maintain a suit in a federal court, assuming the necessary jurisdictional facts to exist, to enjoin the company from constructing its line? We submit that in such a suit the company could not successfully contend that the granting of an injunction would be an interference with the state court proceeding under which the company acquired the right to construct such line. Precisely the same situation is presented in the case now before this Court. The petitioning land owners in the Burns Ditch drainage proceeding have acquired the right to build the Burns Ditch through the entry of a decree establishing the ditch. For convenience of administration the legislature has designated the Circuit Court of Porter County, and its agent, Appellee, as the party to construct the ditch. In constructing such ditch Appellee represents and stands for such land owners (see cases cited on page 21 of our argument), and the court itself, so far as it is constructing this ditch, also represents and stands for such owners, and neither Appellee nor the court is exercising any function other than a purely executive or administrative one. Merely because the court has been named by the legislature as the party to construct the ditch does not make his act of constructing the ditch a judicial act. (See case cited on page 15 of our original argument.) Nor does the fact that the legislature has conferred upon the court the power to adjudicate purely judicial issues in the drainage proceeding make the act of constructing the ditch a *judicial act*. By whomsoever performed the act of constructing the ditch is an executive or administrative act entirely separate and distinct from the judicial proceeding and we submit that such act may be enjoined by a federal court.

MERITS OF THE CASE.

The Supreme Court of Illinois and the Supreme Court of Indiana have established the rule that every riparian owner has an equal right to the regular, uniform flow of water of a stream past his land, and that no upper riparian owner may so divert such flow as to destroy the property right of a lower riparian owner in such flow.

Evans v. *Merriweather*, 4 Ill., 492.
Plumleigh v. *Dawson*, 6 Ill., 544.
Bliss v. *Kennedy*, 43 Ill., 67.
Washington Ice Co. v. Shortall, 101 Ill., 46, 54.
City of Kewanee v. *Otley*, 204 Ill., 402, 409-10.
Dilling v. *Murray*, 6 Ind., 324.
Mitchell v. *Parks*, 26 Ind., 354.
Blessing v. *Blair*, 45 Ind., 546.
Taylor v. *Fickas*, 64 Ind., 167.
Mitchell v. *Bain*, 142 Ind., 604; 42 N. E., 230.
Valpariso City Water Co. v. *Dickover*, 17 Ind. App., 233; 46 N. E., 591.
Bump v. *Sellers*, 54 Ind. App., 150; 102 N. E., 875.

In the case last cited a suit was brought by a lower riparian owner to enjoin an upper riparian owner from constructing a drainage ditch which would divert water from the stream flowing through the former's land, to his damage. A perpetual injunction was granted by the court below and the decree was affirmed by the Appellate Court. In the course of its opinion the court said:

> "The court has found as facts that the proposed drain would tap and drain off the water from the natural watercourse, and would divert the water from the stream to plaintiff's damage. It seems to us that these facts are sufficient to bring the case within the well known rule that *an upper riparian owner may not use or divert the waters from a stream in such a way as to destroy or materially diminish the watercourse, or render it unavailable for the use of the lower proprietor.* See *Farnham*,

Water Rights, Secs. 489, 496-500; *Dilling* v. *Murray*, 6 Ind. 324, 63 Am. Dec. 385." (Italics are ours.)

This Court has very recently held that "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of land. A destruction of this right is a taking of a part of the land."

United States v. *Cress*, 243 U. S., 316, 330.

In that case the damage was occasioned by the holding back of water by the government to such an extent that the flow of water in its natural course at the mill was stopped, thereby destroying the mill power. In our case the threatened diversion of water from the Little Calumet River through the proposed ditch will materially lessen the flow of water past Appellee's plant, to its serious damage.

In *Pine* v. *Mayor of the City of New York*, 103 Fed., 337, a citizen of Connecticut filed a bill to enjoin the City of New York from diverting water (in New York) from an interstate stream flowing from New York into Connecticut upon which complainant's land and steam mill (in Connecticut) were located, for the purpose of supplying such water to the City of New York, which diversion would decrease the flow of the stream more than one-fourth. The court held that the statutes of the State of New York did not undertake to give power to condemn for public purposes land which was situated in another state, and that if they had done so they would be ineffective; that the diversion of water could not be excused by the fact *that it was deemed to have been taken for a public benefit*, and that the injunction to prevent a permanent and unauthorized seizure and diversion of the running water in the stream was a proper

remedy, although the pecuniary damage was not large. The decision was affirmed by the Circuit Court of Appeals in *Pine* v. *Mayor,* 112 Fed., 98. In its opinion the Court of Appeals discussed the right of the State of New York to authorize one of its municipalities to divert the waters of an interstate stream to the injury of riparian owners in another state and held that the State of New York had no such authority over property outside its limits and beyond its jurisdiction.

In delivering the opinion of the Court of Appeals, Thomas, District Judge, said (p. 99):

> "Without reference to authorities, certain applicable legal rules may be accepted, viz: (1) The defendant is not a riparian owner, and is not exercising the usual rights of riparian owners; (2) even if the defendant had acquired all the riparian rights save those of the complainants, the diversion is not thereby justified; (3) the State of New York cannot authorize the taking of property in Connecticut; (4) the diversion of the water is not an act which a court of equity could approve or regulate under a power to apportion or adjust the use of the water among riparian owners; (5) the usual powers of the State of New York respecting navigable rivers within its borders do not extend to unnavigable interstate streams; (6) the diversion is a tortious act initiated in New York, and, as to the complainants, taking effect in Connecticut, for which the present suit should lie; (7) the diversion of water at one point is a taking of the property of riparian owners below the point of diversion, and falls within the constitutional protection; (8) the right of the complainants to use the water as it is wont to flow is not an easement, but an incident to, and inseparably connected with, their land; (9) a court of equity, asked to enjoin the taking of property, where such taking is not authorized, and is therefore tortious, will not make its decree for an injunction conditional upon the ascertainment of the value of the property taken, and payment to the complainants, unless there be present facts which should equitably estop the complainants, and limit

> them to such relief. The foregoing propositions are based largely upon principles of the common law, and supported uniformly in all jurisdictions where as to this subject the common law prevails, as it does in the States of New York and Connecticut, unless certain decisions in Massachusetts be exceptions."

The case was then brought to this Court and in an opinion reported in 185 U. S., 93, this Court held that the complainant below had been guilty of laches in allowing the defendant to complete its construction before filing his bill and by other conduct leading the defendant to believe that he would accept compensation and not insist upon his absolute rights. This Court assumed for the purpose of its decision that the plaintiff would suffer substantial damage by the proposed diversion of the water in the stream; that although the stream above the dam and all sources of supply of water to the stream at that point were within the limits of the State of New York, it had no power to appropriate such water or to prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiff had a legal right to the natural flow of the water through his farm in Connecticut and could not be deprived of that right by and for the benefit of the City of New York by any legal proceedings either in Connecticut or New York; and that a court of equity at the instance of the plaintiff, at the inception and before any action had been taken by the City of New York would have restrained all interference with such natural flow of the water. The foregoing propositions of law, which were assumed but not decided by this Court in that case, are precisely the propositions of law involved upon the merits of this case, and we respectfully submit that there can be no doubt but that the

propositions assumed by the Court should be accepted as correctly stating the law.

In *Head* v. *Amoskeag Mfg. Co.*, 113 U. S., 1, this Court, in discussing the constitutionality of a mill act, said in its opinion (p. 23):

> "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, *not interfering with a like reasonable use by those above or below him.*" (Italics are ours.)

In *Cohen* v. *United States*, 162 Fed., 364, the United States government by the construction of a canal so diverted the flow of a stream running through petitioner's land as to injure her property. In passing upon petitioner's rights to the flow of the stream through her land, Morrow, Circuit Judge, said (p. 368):

> "The government has diverted the waters of Sausal Creek at the point where it enters the subsidiary canal, and in effect has taken and appropriated the stream below that point, and the petitioner has been deprived of his flow adjacent to and upon her premises. *This is a taking, within the constitutional provision.*" (Italics are ours)

The right of a lower riparian owner to the continuous flow of water in the stream in its natural state past his land and to make use of such flow for any lawful purpose has been considered by the courts of many other states, and the rule is quite uniformly established that if one, not a riparian owner, diverts water from a stream, or if a riparian owner diverts water from a stream, in either case resulting in present or potential injury to a lower riparian owner, such diversion alone, without proof of actual or perceptible damage to such lower ri-

parian owner, is sufficient ground for granting an injunction.

Stock v. *Jefferson,* 114 Mich., 357; 72 N. W., 132.
Stratten v. *Mt. Hermon Boys' School,* 216 Mass., 83; 103 N. E., 87.
McCarter v. *Hudson County Water Co.,* 70 N. J. Eq., 695; 65 Atl., 489, 494.
Mayor of Paterson v. *East Jersey Water Co.,* 74 N. J. Eq., 49; 70 Atl., 472 (affirmed in 78 Atl., 1134).
Roberts v. *Martin,* 72 W. Va., 92; 77 S. E., 535.
Scranton Gas & Water Co. v. *Delaware L. & W. Co.,* 240 Pa., 604; 88 Atl., 24.
Porter's Bar Dredging Co. v. *Beaudry,* 15 Cal., 751; 115 Pac., 951.

We will now refer briefly to some of the cases cited by counsel for Appellee in support of their contentions in this case.

The cases of *Rickey* v. *Miller,* 218 U. S., 258, *Bean* v. *Morris,* 221 U. S., 485, *Rundle* v. *Delaware, etc., Co.,* 14 Howard, 80, *Manville Co.* v. *Worcester,* 138 Mass., 89, and *Thayer* v. *Brooks,* 17 Ohio, 489, are cited by counsel in support of the proposition that in order to give a *locus standi* to a lower riparian owner, whose lands are in another state, to complain of the diversion of an interstate stream, it must appear that there is a concurrence of the laws of the two states in respect to rights in the stream. An examination of the decisions of the courts of Illinois and of Indiana above cited by us will show beyond doubt that there is a complete concurrence of the laws of the two states in respect to the rights of riparian owners to the uniform, uninterrupted flow of water of the stream upon which their lands are located, and in establishing the rule that no upper riparian owner may so

divert such flow as to destroy the right of a lower riparian owner in the flow. Two of the cases cited by counsel for Appellee support directly Appellant's contentions in this case.

In *Bean* v. *Morris, supra,* this court affirmed the decree of the lower court giving to a lower riparian owner in Wyoming a certain number of inches of water of a stream in priority over the rights of an upper riparian owner in Montana who had been interfering with the natural flow of the stream so as to prevent the lower riparian owner from having his share of the water. In its opinion this court said that the State of Montana had full legislative power over the stream in question, while it flowed within that state, subject, however, *to vested private rights, if any, protected by the Constitution.* Subject to this qualification the concurrence of the laws of Montana with those of Wyoming was necessary to create easements of such private rights and obligations as were in dispute across their common boundary line.

In *Manville Co.* v. *Worcester, supra,* the Supreme Court of Massachusetts sustained the judgment of the lower court giving damages to the owner of a mill in Rhode Island upon the Blackstone River for the diversion of water by the defendant in Massachusetts in a tributary of that river, which diversion materially affected the operation of the plaintiff's mill. The court apparently recognized that the laws of the two states were similar with respect to the rights of riparian owners.

The case of *St. Anthony Falls Company* v. *Water Commissioners,* 168 U. S., 349, and the case of *Shively* v. *Bowlby,* 152 U. S., 1, hold that questions relating to riparian ownership and the ownership of the bed of a stream are local in character and should be decided by

the state laws and that the federal courts will recognize any rules upon these subjects laid down by the highest court of the state. For that reason in the *St. Anthony* case this Court refused to disturb a decision of the Supreme Court of Minnesota holding that the diversion of water from a lake for the use of the City of St. Paul, even though a lower riparian owner upon a stream into which the lake emptied was thereby injured, would not be enjoined, and that damages for such diversion would not be allowed. This Court said (page 371) that there was no decision of the Supreme Court of Minnesota holding that a riparian owner was entitled to the use of all the water which would naturally flow past his lands. If this Court had found that the settled rule of law established by the decision of the Supreme Court of Minnesota did confer upon the riparian owner the right to use all the water naturally flowing past his lands, its decision in the St. Anthony Falls case would, we submit, have been very different, and the relief prayed for in that case would probably have been granted.

The cases of *City of Valparaiso* v. *Hagan,* 153 Ind., 337; *City of Richmond* v. *Test,* 18 Ind. App., 482; *Barnard* v. *Shirley,* 135 Ind., 547; *Taylor* v. *Fickas,* 64 Ind., 167, apparently establish the rule in Indiana that a riparian owner cannot recover damages for injury to his property occasioned by the discharge of sewage into the stream from a city located at a point upon the stream above the land of such owner. It is to be noted that the Constitution of Indiana differs essentially from the Constitution of Illinois, in that the former provides that property may not be *taken* for public use without compensation, whereas the latter provides that property may not be *taken* or *damaged* for public use without compen-

sation. In the City of Richmond case, however, the court again stated—

> "that in the absence of grant, license or prescription limiting his rights, a riparian proprietor has the right to have the waters of a natural watercourse flow along or through his premises as they would naturally flow, without change of quantity or quality."

In these cases the court seems to consider that the use of a stream for carrying away sewage of a city located upon its banks is *one of the natural uses of a stream,* on account of which a lower riparian owner may not complain. It is not controverted that a riparian owner may make any reasonable use of the stream without accountability to a lower riparian owner. He may even draw from the stream such water as may be necessary for his personal consumption and domestic use. A far different situation is presented, however, when a substantial portion of the water in the stream is taken out or diverted from its natural flow, as is alleged will be done in the case now before this Court. Such action involves not merely *injury to the property* of a lower riparian owner, but the actual *taking of his right to have the water flow by his land unobstructed,* which is equivalent to *taking a part of his land,* as was in effect stated by this Court in *United States* v. *Cress, supra.*

As a matter of fact, the doctrine announced in the Indiana cases last above cited has been later criticized by both the Appellate and Supreme Courts of Indiana in the case of *Niagara Oil Co.* v. *Jackson,* 48 Ind. App., 238; 91 N. E., 825, and *Pa. Glass Co.* v. *Schwinn,* 177 Ind., 645; 98 N. E., 715.

Counsel for Appellee attempt to justify their position by a reference to the police power of the State of Indiana. This Court, however, has held that private prop-

erty may not be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety any more than under a police regulation having no relation to such matters, but only to the general welfare.

Chicago, Burlington & Quincy Ry. Co. v. *Drainage Commissioners,* 200 U. S., 561, 592-3.

In the case of *Manigault* v. *Springs,* 199 U. S., 473, a bill was filed to enjoin the damming of a creek which would cause water from a river to flow back upon complainant's property unless he raised and strengthened the banks of the river. This Court denied relief in the case on the ground that the overflow to the mere extent indicated did not constitute a taking of property within the meaning of the law when the damage could be prevented by raising the banks, or that if the damage stated did in fact result it would not justify the interposition of a court of equity. This Court said that private interests are subservient to a proper exercise of the police power of the state, *except where property is taken for which compensation must be paid.* After reviewing some of the cases this Court said (484-5):

> "We think the rule to be gathered from these cases is that *where there is a practical destruction, or material impairment of the value of plaintiff's lands,* there is a taking, which demands compensation, but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow." (Italics are ours.)

In the case now before this Court, under the rule established in *United States* v. *Cress, supra,* there will be an *actual taking of Appellant's property* in Illinois, namely, its *right to the enjoyment of the natural flow of the river,* without the hindrance imposed by the operation of the

Burns Ditch, and this Court in the *Manigault* case clearly recognized that such a condition of affairs presented an exception to the rule stated in that case.

In the case of *Hudson County Water Co.* v. *McCarter*, 209 U. S., 349, the question presented was whether the State of New Jersey could, by statute, declare it unlawful for any person to transport water through pipes from the State of New Jersey into some other state. The Hudson County Water Company, under a contract with the City of Bayonne, in New Jersey, had laid mains in that city for the purpose of carrying water from the Passaic River to Staten Island in the State of New York. A proceeding was then brought under the New Jersey statute to enjoin the company from continuing to take water out of the state. The highest court of New Jersey (decision reported in 70 N. J. Eq., 695; 65 Atl., 489) approved a decree enjoining the company from so doing, and upon appeal this Court affirmed the decree. This Court held that the police power of the state was broad enough to sustain the law in question. In its decision this Court used this significant language bearing upon the case now under consideration (p. 356):

> "But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. *The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.*" (Italics are ours.)

The case of *Kansas* v. *Colorado*, 206 U. S., 46, arose out of a condition of affairs materially different and distinguishable from the conditions in the case now before

this Court. The general rule with reference to the rights of lower riparian owners has been departed from in many of the western states because of mining conditions, and because great areas of those states were utterly useless without irrigation. The legislatures of these states created a right in property owners to divert water from its natural course in a stream through canals and ditches into stretches of land sometimes many miles distant from the stream, for the purposes of mining and irrigation, and this Court has recognized in its decisions that this right of diversion was lawful in the states in which such conditions existed. (*Atchison* v. *Peterson,* 20 Wall., 507, 511-2, and *U. S.* v. *Rio Grande Irrigation Co.,* 174 U. S., 690, 702-3.) The constant diversion of the water in the Arkansas River in Colorado by land owners, for irrigation purposes, materially diminished the flow of the river into the adjoining State of Kansas, and the State of Kansas thereupon instituted a proceeding in this Court against the State of Colorado, and certain of its citizens who were so diverting the water of the Arkansas River, to enjoin such diversion. This Court went into the facts exhaustively and weighed the respective benefits from irrigation to the States of Colorado and Kansas and the injuries to certain portions of the State of Kansas, and came to the conclusion that at the time the bill was filed there was relatively little injury sustained by the State of Kansas, and that, regarding the interests of both states and the right of each to receive benefit through irrigation and in any other manner from the waters of the Arkansas River, the Court was not satisfied that the State of Kansas had made out a case entitling it to a decree. This Court, however, said that if in the future there came a time when the waters of the Arkansas River were so depleted by irrigation in Colorado that there was no longer an equitable division of benefits from

irrigation between the two states, the State of Kansas might institute another proceeding to enjoin the State of Colorado from appropriating more than its fair proportion of the water for irrigation purposes in that state. It seems to us that the fundamental principle underlying that decision is that the State of Colorado could not appropriate the waters of the Arkansas River to such an extent as to seriously injure the State of Kansas.

With respect to the case now before this Court it must always be kept in mind that the rule of law that the water of a stream may not be diverted by any one to the injury of a lower riparian owner is still in force both in the State of Indiana and in the State of Illinois. The State of Indiana, even in the exercise of its police power to reclaim swamp land, may not take away the valuable property right of Appellant to have the water of the Little Calumet River flow by its plant in Illinois in the usual course, since by so doing the state would deprive Appellant of its property without due process of law in direct violation of Section 1 of Article XIV of the Constitution of the United States.

We respectfully submit that Appellant's bill of complaint in the District Court presented a meritorious cause of action and that the court erred in dismissing the bill for want of jurisdiction and that its decree should be reversed and the case remanded for further proceedings.

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Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

Appeal from the District Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT FOR APPELLEE.

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Geo. Hornstein Co., Printer, Chicago.

(26,119)

SUBJECT INDEX

LIST OF CASES CITED.

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BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF CASE.

The drain in question was ordered established and constructed by the Porter Circuit Court of Indiana, and, on due course of appeal, taken by certain railroad companies, this judgment was affirmed by the Supreme Court of Indiana (*Lake Shore, etc., R. Co.* v. *Clough,* 182 Ind., 178), and on writ of error the judgment of the latter court was affirmed by this honorable tribunal. (*Lake Shore, etc., R. Co.* v. *Clough,* 242 U. S., 375.)

The case at bar was a suit brought by appellant in the United States District Court of Indiana to enjoin

the Drainage Commissioner from constructing said drain. He is sued as "Drainage Commissioner for the construction of the Calumet Ditch under the *proceeding* now pending in the Circuit Court of Porter County, entitled," etc. (Rec., p. 1.) The bill avers that

> "under said decree of the Circuit Court of Porter County, entered on March 22, 1911, the defendant, Stephen P. Corboy, was assigned commissioner for the construction of said ditch, and said defendant is now acting as said commissioner and proposes to proceed with the construction and completion of said ditch. No portion of said ditch has yet been constructed. Defendant claims the right to construct said ditch under and by virtue of said *proceeding* instituted under the authority of the Drainage Act above mentioned." (Rec., p. 7.)

While the facts regarding the proposed drain, and the necessity therefor, are brought out with more emphasis by appellee's answer and the special findings of the Porter Circuit Court in the original case, which are made an exhibit to the answer (Rec., pp. 11, 20), yet the bill itself discloses the situation. (Rec., p. 1.) It there appears that the controversy is between the claim of right of appellant, a property owner in Illinois, to such an interest in that portion of the waters of an interstate stream, while flowing in Indiana, that it may insist that the State of Indiana shall desist from the exercise of its police power to rid itself of an extensive marsh within its borders, in favor of appellant, who, at some unfixed date, commenced to use the waters of the stream in Illinois to condense the exhaust steam generated in its plant.

The bill alleges complainant's ownership, at that point to the center of the river, and charges that the diversion of the stream by defendant will reduce its flow and velocity at complainant's plant more than one-half.

The sole purpose of the bill was injunction.

POINTS AND AUTHORITIES.

I.

(a) The attempt to restrain the drainage commissioner is in effect the same as an attempt to restrain the proceedings.

Dietzsch v. *Hinchkoper*, 103 U. S., 494.

French v. *Hay*, 22 Wal., 250.

Western Union Tel. Co. v. *Louisville, etc., R. Co.*, 218 Fed., 628 (C. C. A.).

Union Pac. Co. v. *Flynn* (C. C. A.) 180 Fed., 565.

Rennselaer, etc., R. Co. v. *Bennington, etc., R. Co.*, 18 Fed., 617.

Hyattsville, etc., Co. v. *Bonic*, 44 App. D. C., 408.

(b) The provisions of Section 265 of the Judicial Code extend to the entire proceedings, from the commencement of the suit until the decree is performed.

Sargent v. *Helton*, 115 U. S., 348.

Chapman v. *Brewer*, 114 U. S., 158.

Wayman v. *Southard*, 10 Wheat., 1.

Leathe v. *Thomas*, 97 Fed., 136 (C. C. A.).

Fenwick Hall Co. v. *Old Saybrook*, 66 Fed., 389.

Amusement etc., Co. v. *El Paso, etc., Co.*, 251 Fed., 345.

II.

Section 265 inhibits the granting of an injunction against proceedings in a state court even where the jurisdiction is attacked.

American Assn. v. *Hurst* (C. C. A.), 59 Fed., 1.

Mills, Sheriff v. *Provident, etc., Co.* (C. C. A.), 100 Fed., 344.

Phelps v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453, confirmed in 190 U. S., 159.

III.

It is not material that the bill seeks to present a constitutional question.

Aultman & Taylor Co. v. *Bramfield* (C. C. A.), 102 Fed., 7, 11.

IV.

The subject-matter was in the possession, actual or constructive, of appellee, as commissioner, who was to all intents and purposes a receiver, and, therefore, the property was in *custodia legis,* and not subject to the writs of other courts.

Wiswall v. *Sampson,* 14 How., 52, 65.

Palmer v. *Texas,* 212 U. S., 118.

V.

The mere fact that a stranger may be prejudiced by the proceeding, the defect not appearing on the face of the record, does not render the judgment void.

VI.

Illinois land owners were not required to be made parties.

(a) In order to give a *locus standi* to a lower riparian proprietor in another state, to complain of the diversion of the waters of an interstate stream, it must appear that there is a concurrence of the laws of the two states in respect to the rights in the stream.

Rickey, etc., Co. v. *Miller,* 218 U. S., 258.
Bean v. *Morris,* 221 U. S., 485.
Rundle v. *Delaware, etc., Co.,* 14 How., 80.
Manville Co. v. *Worcester,* 138 Mass., 89; 52 Am., 261.
Thayer v. *Brooks,* 17 Ohio, 489; 49 Am. Dec., 474.

(b) Riparian questions are state questions, and if the laws of the state do not afford a cause of action, on account of secondary or consequential damage sustained by the diversion of the stream, the lower proprietor is remediless.

Shively v. *Bowlby,* 152 U. S., 1.
St. Anthony Falls, etc., Co. v. *Board,* 168 U. S., 349.

(c) Under the law of Indiana, the lower proprietor cannot recover for a secondary or consequential injury to his riparian rights occasioned by the proper exercise of the police power.

City of Valparaiso v. *Hagen,* 153 Ind., 337.
City of Richmond v. *Test,* 18 Ind. App., 482.

And see:

Barnard v. *Shirley*, 135 Ind., 547.
Taylor v. *Fickas*, 64 Ind., 167.
Cincinnati, etc., R. Co. v. *Connersville*, 170 Ind., 316.

(d) It is the general rule, recognized in Indiana, that riparian proprietors have no property in the water itself.

Atchison v. *Peterson*, 20 Wall., 507.
City of Richmond v. *Test*, 18 Ind. App., 482, and cases.
Angell on Watercourses, Secs. 94 and 95.

(e) Wandering things, like water, oil and gas, are only the subject of a right to reduce the same to possession while on the land, and, therefore, such rights are peculiarly the subject of regulation for the public good.

Ohio Oil Co. v. *Indiana*, 177 U. S., 190.
Townsend v. *State*, 147 Ind., 624.

And see:

Gentile v. *State*, 29 Ind., 409.

(f) A stream, which extends many miles through the territory of an upper state, is affected with a public interest and is peculiarily liable to regulation.

Chicago, etc., R. Co. v. *Grimwood*, 200 U. S., 561.

(g) There being no "taking" of complainant's property, the determination of every other question in the proceeding, since appellant's *res* was beyond

the state line, involved only the exercise of powers of government, concerning which there was no right to be heard.

Paulson v. *City of Portland,* 149 U. S., 30, 40.

Goodrich v. *Detroit,* 184 U. S., 431.

Barber Asphalt Pav. Co. v. *Edgerton,* 125 Ind., 455.

Edwards v. *Cooper,* 168 Ind., 54, 66.

(h) No person has a vested right in any general rule of law or policy of legislation.

Chicago, etc., R. Co. v. *Tranbarger,* 238 U. S., 67.

(i) Acts done by a state, involving the exercise of police powers over non-navigable streams, stand on the same footing, so far as indirect or consequential injury are concerned, as improvements of public rivers by the United States.

Manigault v. *Springs,* 199 U. S., 480.

(j) The state, as a quasi-sovereign, may protect the interests of its people in rivers within its boundaries.

Hudson County Water Co. v. *McCarter,* 209 U. S., 353, 355.

(k) Each state has full jurisdiction over that part of a stream which is within its borders and may determine for itself the rule of law which is to obtain concerning riparian rights.

Kansas v. *Colorado,* 206 U. S., 43, 92.

(l) There being no "taking," the only justicable controversy is one which is not of a private right to wage. The only remedy, if one exists, would be in a suit by the State of Illinois against the State of Indiana in this court, and in such a case the court would apply, as in international controversies, the rule of the greatest good to the greatest number.

Kansas v. *Colorado*, 206 U. S., 46.

(m) An upper state may control a stream within its own boundaries, even where its rights are drawn in question by the lower state, against all claims except those which the court would be prepared "deliberately to maintain against all considerations on the other side."

Missouri v. *Illinois*, 206 U. S., 496, 521.

VII.

The mere charges of the invalidity of the statute, judgment and proceedings amount only to legal conclusions and do not aid the pleading.

Alabama v. *Burr*, 115 U. S., 413.

Central Nat. Bank v. *Connecticut, etc. Co.*, 104 U. S., 54.

St. Louis v. *Knapp*, 104 U. S., 568.

VIII.

Even after the rendition of the decree establishing the drain and ordering the work constructed, the cause continued to pend in the state court, to all intents and purposes as in the case of a receivership, with power on the part of the court not only to enforce the direct provisions of the statute con-

cerning the duties of the commissioner, but with power to meet any situation which might develop in the course of the construction of the drain.

Mak-Saw-Ba Club v. *Coffin,* 169 Ind., 204.
Rogers v. *Voorhees,* 124 Ind., 469.
Murray v. *Gault,* 179 Ind., 658.
Steele v. *Hanna,* 117 Ind., 333.
Karr v. *Board,* 170 Ind., 571.

IX.

The proceeding was not legislative, since it involved the awarding of rights granted by existing laws. If the legislature sees fit to make provision for the determination by a judicial tribunal of the right to the relief provided for by the statute, after an inquiry involving the determination of questions of law and fact, had after the manner of the common law, such proceedings are judicial, and the proceedings constitute a suit in the state court, concerning which the District Court of the United States cannot interfere from the time that the petition is filed until the drain is constructed and the commissioner discharged.

See

Boom Co. v. *Patterson,* 98 U. S., 403.
Union Pac. R. Co. v. *Meyers,* 115 U. S., 2.
County of Upshur v. *Rich,* 135 U. S., 467.
In re The Jarnecke Ditch, 69 Fed., 161.

ARGUMENT.

Case is one of a "proceeding" in state court, even if matter only continued to pend for enforcement of decree.

Appellant's counsel have endeavored to show that at the time the bill was filed herein, there was no judicial proceeding pending in the Porter Circuit Court, apparently overlooking the fact that the effort to enjoin in a Federal Court an officer charged by a state court with the execution of its decree, and subject to contempt for disobedience, is quite as much within the principle of the prohibition found in Section 265 of the Judicial Code (formerly Section 720 of the Statutes) as a direct interference with the court itself. The state court, having entered its decree, would, in the nature of things, be disposed to see to it that its execution, which has been called the fruit of the law, was enforced against outside interference, and as a result there would be likely to ensue a conflict between that court and the officer of a court attempting to break in on the jurisdiction.

The attempt to restrain the drainage commissioner from discharging the duties devolved upon him in respect to the construction of the ditch is, in effect, the same as an attempt to restrain the proceedings.

Dietzsch v. *Hinchkoper*, 103 U. S., 494.
French v. *Hay*, 22 Wal., 250.

Western Union Tel. Co. v. *Louisville, etc., R. Co.*, 218 Fed., 628 (C. C. A.).

Union Pacific Co. v. *Flynn* (C. C. A.), 180 Fed., 565.

Rennselaer, etc., R. Co. v. *Bennington, etc., R. Co.*, 18 Fed., 617.

The provision of Section 265, *supra*, applies to prevent an injunction issuing against proceedings in a state court at any stage of such proceedings, and it extends, not only to the proceedings in a state court up to and including the final judgment, but to the entire proceedings from the commencement of the suit until the decree is performed.

Sargent v. *Helton*, 115 U. S., 348.

Chapman v. *Brewer*, 114 U. S., 158.

Wayman v. *Southard*, 10 Wheat., 1.

Leathe v. *Thomas*, 97 Fed., 136 (C. C. A.).

Fenwick Hall Co. v. *Old Saybrook*, 66 Fed., 389.

Section 265 inhibits the granting of an injunction against proceedings in the state court even where the jurisdiction is attacked.

Dealing with the precise question which counsel raise, by their assertion that the court may enjoin because the complainant was not a party to this proceeding in the Porter Circuit Court, we call attention to the case of *American Assn.* v. *Hurst* (C. C. A.), 59 Fed., 1, wherein suit was brought in the Federal Court to enjoin a sheriff from levying an execution issued out of a state court upon certain real estate, for the reason, as complainant alleged, that it was not a party to the proceeding in the state

court, and that the property about to be sold by the sheriff was in part the property of complainant. The court, speaking by Taft, J. (Lurton and Severens, J. J., concurring), said:

> "The questions necessary for us to consider are—First, whether the sale of land by a sheriff under an execution issued out of the Kentucky court of equity on a sale bond filed therein against the sureties thereon is 'a proceeding' in that court within the meaning of Section 720, Rev. St.; and, second, whether such a sale is 'a proceeding' within the section, even if the land to be sold has been improperly levied upon as the land of a surety in the sale bond and in fact belongs to another person, a stranger to the proceeding. * * * It could hardly be contended that the execution issued on a sale bond, which was given the effect of a judgment by special order of the court, was not a proceeding in that court. Now that by express statute every order of sale impliedly requires the giving of a sale bond, which shall have the effect of a judgment, it is equally clear that the approval of the sale bond makes the execution issued thereon in accordance with the statute a proceeding of the court in which the bond is filed. The claim of counsel that it is a mere ministerial process issuing from the office of the court, without judicial sanction cannot be sustained. * * * But it is said that, even if an execution on a sale bond levied on the property of the obligees is a 'proceeding' of the court in which the bond is filed, an attempt to levy such execution on the property of another, as the property of an obligor in the bond, is void, and as it is not authorized by the execution, and is without the authority of the court, neither the levy nor the sale under it are 'proceedings' of the court within Section 720. * * * The principle is that, in order to preserve the dignity and protect the effective-

ness of the process of courts of concurrent jurisdiction and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect of staying the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings. A replevin of personal property in the hands of its officer, or an injunction against a levy upon personal property by such officer, will certainly not more offend the dignity of the court, or more interfere with the due discharge of business before it, than will an injunction against a levy on real estate by its officer under color of its process. * * * Of course, in the case of tortious levies upon either personal property or real estate, the person injured may always hold the executive officer liable as a tort feasor for any wrong done in any court having jurisdiction, but comity and public policy require him to apply to the court issuing the process under color of which the wrong is or is about to be done for specific relief by order of injunction or restoration of property. * * * It is clear that the act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a 'proceeding' of that court, which comity and public policy require courts of concurrent jurisdiction not to interfere with by injunctive or dispossessory process. *If this be the rule of comity and public policy in the absence of a statute, it is conclusive in determining the true construction of Section 720, Rev. St., and the meaning of the words used therein, 'proceedings in any court of a state.'* That section was passed, not to preserve comity and harmonious action between

courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereignties exercising concurrent jurisdiction over the same territory. *The purpose of the statute is so important that a liberal construction should be given to accomplish it.*"

In the case of *Mills, Sheriff*, v. *Provident, etc., Co.* (C. C. A.), 100 Fed., 344, it was sought to enjoin the sheriff of a county from selling land as belonging to a judgment debtor, it being alleged that the land involved belonged to complainant, and that complainant was not a party to the action of the state court in which the judgment was obtained under which the sale was about to be had. The court said:

"It appears from the opinion of the court below that it did not doubt that an execution against property, issued to enforce a money judgment rendered by a state court, is a 'proceeding' within the meaning of that term as used in Section 720 of the Revised Statutes under which every United States court is forbidden, but the court below was of opinion that that section applies only to parties and privies to the action in the state court. * * * *There is nothing in the language of Section 720 of the Revised Statutes, nor in the reason of the enactment, limiting its provisions to parties and privies to the proceeding in the state court, but the prohibition is general, and denies to every federal court the right to stay by injunction, at the suit of any person, proceedings in any court of a state.*"

In the case of *Phelps* v. *Mutual Reserve Fund Life Asso.* (C. C. A.), 112 Fed., 453, affirmed in 190 U. S., 159, the court said:

> *"That the property of a stranger to the proceeding has been taken will not justify a writ of replevin or any other dispossessory or injunctive proceeding, in the court of another jurisdiction, is well settled. Freeman* v. *Howe,* 24 How., 450; 16 L. Ed., 749; *Buck* v. *Colbath,* 3 Wall., 334; 18 L. Ed., 257; and *Covell* v. *Heyman,* 111 U. S., 176."

The case of *Phelps* v. *Mutual Reserve Fund Life Asso., supra,* contains a discussion of the question as to whether a want of jurisdiction in the state court takes the case out of Section 265, *supra,* which is at once so strong and so philosophical that we may be pardoned in quoting from it at length. The opinion was written by Mr. Justice Lurton and concurred in by Mr. Justice Day and also by Justice Severens. It appears from the report of that case in the Circuit Court of Appeals that an action had been brought in a state court of Kentucky against a life insurance company to recover a sum of money. The defendant, having unsuccessfully challenged the service, declined to plead further, and judgment by default was rendered against it. Execution issued on this judgment, and there was a return of *nulla bona.* The court then permitted the plaintiff to file in the original cause what was styled an amended and supplemental petition praying for a receiver, and a receiver was thereupon appointed. The company then filed its bill of complaint in the United States court for an injunction, alleging, among other things, that there was no service upon the so-called amended and supplemental petition, and that the proceeding was without due process of law, and in violation of the 14th Amendment. An injunction

having issued, and a motion to dissolve the same having been overruled, an appeal was prosecuted to the Circuit Court of Appeals. As stated by Mr. Justice Lurton, in rendering the opinion of the latter court, reversing the District Court:

> "The ground upon which the court below proceeded was that there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceeding. To quote the figurative, yet forcible language of Judge Evans, 'the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stalk.' For this reason, said the Judge, 'the filing of the supplemental petition and the action of the court in appointing a receiver thereupon will be treated as mere nullities.'"

In considering this question the Circuit Court of Appeals said:

> "There is no pretense of any prior suit in the United States Court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the state court, forbidding interference with its receiver, is met with a counter injunction forbidding the receiver to proceed with the duties of his appointment, and forbidding his interference with the property of the Mutual Reserve Life Fund Association, which the state court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force. * * * If there are principles of comity or of statutory construction by which so deplorable a conflict between coequal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered

harmonious, it is our highest duty to discover and apply them. * * * It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy or of the *res* should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided and the *res* discharged from its control. This rule has its foundation, perhaps, in comity, but the fruits of its recognition have been so beneficent, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application. No useful purpose will be subserved in making quotations from them. We content ourselves with the citation of a few which are most in point. [Citing cases.] The courts of the state and of the United States are, as to each other, foreign courts. Nevertheless the power sometimes exercised by courts of equity to restrain parties within their jurisdiction from proceeding in a foreign court does not apply to them, and it has long been recognized that state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. [Citing cases.] Section 720 originated in 1793, and is a legislative command affirmatively enforcing this rule of comity by expressly prohibiting the enjoining of proceedings in state courts, except when authorized in bankrupt cases. Some cases other than bankruptcy suits have been held not to be within the literalism of the statute. Thus it has been held that the statute does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy

[citing cases], nor from enforcing its own judgments in causes removed from the state court [citing cases]. So it has been held that, when the requisite federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment obtained by fraud in a state court. [Citing cases.] * * *

"It is plain that in all these cases the federal court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res,* or of the controversy, or enforcing its own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed, such a suit could be maintained in a Circuit Court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment, and operative only through its jurisdiction over the parties thereto. * * *

"The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee association within the State of Kentucky. * * * *It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown.* The question we have to deal with involves no such question, but concerns the power of a United States Circuit Court, in view of Section 720, to enjoin a proceeding in a state court of concurrent jurisdiction for the purpose of determining whether or not it had exceeded its jurisdiction in respect to the matter complained of. A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive, is but the possession of the

court, and, when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is within both its letter and spirit? Is it enough to take a given case out of the statute that the complainant, asking an injunction against action under an order, a writ, or process from a state court, challenges the power of the court to make the order or issue the writ complained of?"

The court then proceeds to consider at length this aspect of the question, and concludes as follows:

"No case has been called to our attention which sanctions the contention of counsel that the mere fact that the jurisdiction of the state court is challenged will justify the enjoining of one court by another. The state and Federal courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest court of a state to the Supreme Court of the United States. They are courts of equal dignity and of concurrent jurisdiction in respect to the subject-matter of this controversy. Neither court has the power to control or coerce the other. If the Circuit Court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson Circuit Court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal, if it exists. We entirely approve the view expressed by District Judge Love in *Senior* v. *Pierce* (C. C.), 31 Fed., 625, 631, in saying that:

'Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the

application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the Federal Court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court, and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal Court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control.' "

Not material that bill seeks to present a constitutional question.

Upon this question also Mr. Justice Lurton has spoken. In *Aultman & Taylor Co.* v. *Bramfield* (C. C. A.), 102 Fed., 7, 11, he said, in pronouncing the opinion of the court:

"But it is said that the complainant has been subjected to the deprivation of certain rights secured by the Constitution for the protection of their property * * * and that the proceeding by which this *prima facie* evidence of liability has been constructed was a proceeding in which the requirement of due process of law was not observed, and that this bill is an action in which complainant invokes the protection of the courts of the United States against the deprivation of the rights guaranteed to it by the 14th Amendment of the Constitution. But if it is plain that no efficient relief can be granted to

the complainant under such a bill unless the court can stop the proceeding in the state court, and draw to itself original jurisdiction to hear and determine the issues presented by the bill, we are still confronted with the positive provisions of Section 720 forbidding an injunction against a proceeding in a state court."

Subject-matter of the proceeding was in custodia legis.

The Indiana Supreme Court has declared that a drainage commissioner occupies a position analogous to that of a receiver, and the analogy is perfect. Nothing can be clearer than the proposition that in such a case a third person cannot break in, through the medium of a collateral suit, on the possession of the court, through its officer. In *Wiswall* v. *Sampson*, 14 How., 52, 65, this court said:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* v. *Smith*, 9 Ves., 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. (1 J. & W., 176, *Brooks* v. *Greathed;* 3 Daniel's Pr., 1984.) And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo;* and this, though their

> right to the possession is clear. (1 Cox, 422; 6 Ves., 287.) * * * This proceeding was explained by Lord Eldon in *Angel* v. *Smith,* 9 Ves., 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave; upon this principle, that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined *pro interesse suo;* the practice being, to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it.' (See, also, 10 Beav., 318; 2 Daniel's Pr., 1271; 2 Madd., 21; 1 P. Wms., 308.)"

The proposition that a receiver or other officer having custody of property on behalf of a state court is not to be disturbed by a writ of injunction from a Federal Court, does not rest alone upon Section 720, but upon the fundamental doctrine that property *in custodia legis* is not subject to the writs of other courts. Actual possession is not necessary.

Palmer v. *Texas,* 212 U. S., 118.

The decree was not void.

In any event the decree of the Porter Circuit Court is not to be treated as a mere *brutum fulmen,* the law under which it was entered being valid and a lack of jurisdiction not appearing on the face of the proceedings. The decree would not be void, even as against a stranger, and much less is it to be

treated as a nullity for the purposes of Section 265 of the Judicial Code, on the mere allegation of a stranger that he is prejudiced by it. As the maxim runs "Matters adjudicated in a cause do not prejudice those who are not strangers to it," but this does not mean that in all cases the stranger may go into any forum to attack the judgment. The proceeding was certainly sufficient to carry the *res* into the jurisdiction of the state court, and while that court, by its commissioner, has constructive possession of the *res*, the whole subject-matter is under the control of that court.

Illinois land owners were not required to be made parties.

In order to give a *locus standi* to a lower riparian proprietor, whose lands are in another state, to complain of the diversion of the waters of an inter-state stream, it must appear that there is a concurrence of the laws of the two states in respect to rights in the stream.

Rickey etc. Co. v. *Miller,* 218 U. S., 258.
Bean v. *Morris,* 221 U. S., 485
Rundle v. *Delaware etc. Co.,* 14 How., 80.
Manville Co. v. *Worcester,* 138 Mass., 89; 52 Am., 261.
Thayer v. *Brooks,* 17 Ohio, 489; 49 Am. Dec., 474.

Riparian questions, after the title has passed out of the United States, are state questions. *Shively* v. *Bowlby,* 152 U. S., 1; *St. Anthony Falls, etc., Co.* v. *Board,* 168 U. S., 349.

Based on the proposition that each state may for itself determine the rule of law in respect to riparian rights, it was held in the case last cited that no Federal objection existed to a holding by the state court that a city might appropriate the waters of a lake for public purposes, by virtue of legislative authority, without making compensation to mill owners who were dependent for power upon a stream which was fed by such lake.

Under the law of Indiana the lower proprietor cannot successfully complain of a secondary or consequential injury to his riparian rights occasioned by the proper exercise of the police power.

City of Valparaiso v. *Hagen,* 153 Ind., 337.
City of Richmond v. *Test,* 18 Ind. App., 482.

And see:

Barnard v. *Shirley,* 135 Ind., 547.
Taylor v. *Fickas,* 64 Ind., 167.
Cincinnati, etc., R. Co. v. *Connersville,* 170 Ind., 316.

It is the general rule, recognized in Indiana, that riparian proprietors have no property in the water itself.

Atchison v. *Peterson,* 20 Wall., 507.
City of Richmond v. *Test,* 18 Ind. App., 482, and cases.
Angell on Watercourses, Secs., 94 and 95.

Wandering things, like water, oil and gas, are not, strictly speaking, subjects of property, but are only the subject of a right to reduce the same to possession while on the land, and therefore such rights are peculiarly the subject of regulation, for the public good.

Ohio Oil Co. v. *Indiana,* 177 U. S., 190.
Townsend v. *State,* 147 Ind., 624.

And see:

Gentile v. *State,* 29 Ind., 409.

Here, apart from general principles of law, the Legislature has provided in the Drainage Act that the method of drainage may be "by diverting such water course from its channel, by deepening, widening or changing the channel of such water course." Sec. 3, Drainage Act.

An easement in a stream which extends many miles through the territory of an upper state is "affected with a public interest; it ceases to be *juris privati* only," and therefore such a right is peculiarly liable to regulation in the public interest.

Nothing is more clear than that in the construction of the drain in question, there is nothing more than a secondary or consequential injury occasioned by the proper exercise of the police power. Neither under the Fourteenth Amendment to the Constitution of the United States nor under the Constitution of Indiana is there any "taking."

There being no taking of complainant's property, and no injury thereto for which damages would have to be awarded, and no effort to charge the property with special benefits, there was no occasion to make complainant a party or to give notice to it, for the determination of every other question in the proceeding involved only the exercise of powers of government concerning which there was no right to be heard.

Paulsen v. *City of Portland*, 149 U. S., 30, 40.

Goodrich v. *Detroit*, 184 U. S., 431.

Barber Asphalt Pav. Co. v. *Edgerton*, 125 Ind., 455.

Edwards v. *Cooper*, 168 Ind., 54, 66.

"No person has a vested right in any general rule of law or policy of Legislature entitling him to insist that it shall remain unchanged for his benefit."

Chicago, etc. R. Co. v. *Tranbarger*, 238 U. S., 67.

Acts done by a state, involving the exercise of its police power over non-navigable streams, stand on the same footing, so far as complaints on account of indirect and consequential injury are concerned, as improvements of public rivers by the United States.

Manigault v. *Springs,* 199 U. S., 480.

The state, as a quasi-sovereign and representative of the interests of the public, may protect the interests of its people, "in the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." The "public interest is omnipresent whenever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots."

Hudson County Water Co. v. *McCarter,* 209 U. S., 353, 355.

Each state has full jurisdiction over that part of a stream which is within its borders, and may determine for itself the rule of law which is to obtain concerning riparian rights.

Kansas v. *Colorado,* 206 U. S., 43, 92.

As against the exertion of the police power of the state to improve its property or abate a nuisance, by modifying or changing the flow of an interstate stream within its boundaries, the riparian rights of proprietors in the lower state, who are damaged by the changing of the stream, must give way. The only justicable controversy which can exist in

such a case is one which is not of private right to wage. The laws of the state wherein the diversion occurs not giving a right of action, the only remedy is in a suit by the lower state against the upper state in this court, and in such a case the court will apply, as in international controversies, the rule of the greatest good to the greatest number.

Kansas v. *Colorado,* 206 U. S., 46.

Even in a controversy between states over an interstate stream, the principle is recognized of the right of the upper state to control the stream within its own boundaries, in opposition to all claims except those which the court would be prepared "deliberately to maintain against all considerations on the other side."

Missouri v. *Illinois,* 206 U. S., 496, 521.

Complainant's bill, in addition to specifically charging that the Drainage Act deprives it of its property without due process of law, charges generally that said act is in violation of the Fourteenth Amendment. This would seem to be an admission that the statute as framed is of such character as to be designed to deny complainant the right to complain, but we pause to point out, if it be claimed that the equal protection of the law be denied, that the language of the Amendment on that subject is that the state shall not "deny to any person *within its jurisdiction* the equal protection of the law." This provision was evidently carefully framed so as not to impair the rights of the state as a quasi-sovereign.

The power of Indiana necessarily ceases at its

own boundaries; it can neither provide for a judgment which will award damages in favor of, nor assess benefits against, a *res* in another state, and appellant, being unable to point out wherein the state has violated the fundamental social compact, stands in the attitude of challenging the exertion of the powers of a government which is sovereign, so far as appellant is concerned.

Beyond the allegation that appellant was not a party, certain general charges are made as to the invalidity of the statute, judgment and proceeding, but these amount only to legal conclusions and do not aid the pleading.

Alabama v. *Burr*, 115 U. S., 413.
Central Nat. Bank v. *Connecticut, etc., Co.*, 104 U. S., 54.
St. Louis v. *Knapp*, 104 U. S., 568.

Status of proceeding after entry of decree establishing the drain and ordering it constructed.

While it will be observed that the Legislature, for a very practical reason, has authorized an appeal to be taken from the decree establishing the drain and ordering the work constructed, yet, the effect of an appeal is only to suspend the work, and after the appeal is disposed of, assuming that the decree still stands, the court then proceeds, through its commissioner, to execute its prior order. While, as indicated, there may be a period of suspension, yet, aside from the element of time interruption, the proceeding is a judicial proceeding in a court.

In *Mak-Saw-Ba Club* v. *Coffin*, 169 Ind., 204, the court said:

"In getting at the *status* of this proceeding at the time in question [during construction], attention should be given to *Perkins* v. *Haywood,* 124 Ind., 445. It was there pointed out that so far as establishing the work as a public drain is concerned, the order upon that subject constitutes the final judgment and that thereafter the cause is upon the docket for the purpose of carrying out the provisions of that judgment. We may, therefore, infer that from the time the construction commissioner is appointed until he is discharged, *his relation to the court is in the nature of a trusteeship.*"

We have had a number of cases decided in Indiana which go to show that at this stage of the proceedings the court may be called on, as an incident of the principal power to establish and order constructed, to perform many acts which are clearly of a judicial character.

In *Rogers* v. *Voorhees,* 124 Ind., 469, it was held that upon petition and notice the court might make additional assessments for the purpose of completing the construction of the drain. Judge Mitchell, speaking for the court, said:

"The drainage of the land cannot be deemed fully accomplished, *nor the proceeding ended, until the drain has been completed* according to the plans and specifications on file, and the expenses of constructing the work, and the costs and damages necessarily incident thereto, have been paid, and until the commissioner, having charge of the work has made his final report, and an order discharging him has been made by the court. *Until this is done the proceeding remains under the control of the court.* An attentive reading of the act referred to, keeping in view the scope and purpose of the statute, and that it is to be liberally construed so as to

promote the end for which it was enacted, makes it manifest that while the proceeding remains under its control the court has large discretion in respect to modifying, equalizing and changing assessments."

A like holding was made in the case of *Murray* v. *Gault*, 179 Ind., 658.

In *Steele* v. *Hanna*, 117 Ind., 333, the court, in holding that after the drain had been ordered established, the lower court had power to correct a mistake in the description of the land affected by the drain, said:

> "The commissioner having charge of the work is, by the express terms of the statute, under the direction and control of the court until the work is finally completed and a final report of the receipts and expenditures made. Section 4279, R. S. 1881. * * * *These provisions are persuasive of the fact that the proceedings, like those in cases of the administration of decedents' estates, and receiverships and the like, remain under the control of the court until the work is finally completed, and the final report of the commissioner approved.* * * * It is an inherent power of a court, while the proceeding remains under its control, to cause its record, or to cause or permit any process, return or report, to be amended, or modified."

In the case of *Wabash R. Co.* v. *Todd*, 186 Ind., 72; 113 N. E., 997, the facts were that after the drain had been ordered established by the Circuit Court, the construction superintendent filed his supplemental application for an order requiring the railroad company to comply with the judgment of the court in respect to opening up its right-of-way to

permit the drain to pass. On such supplemental application the company appeared and the court granted the order. On appeal by the company it was contended by it that "appellee, as superintendent for the construction of the drainage improvement, has no authority under the law to maintain this action, either individually or as a relator, and that the trial court had no jurisdiction of the subject-matter of the alleged action." In affirming the judgment the court said:

> "The judgment which established the drain and ordered its construction was final in character and terminated the adversary proceedings, but *the action thereafter remained on the court docket for the purpose of carrying such judgment into effect.* * * * *As superintendent for the construction of an improvement, established by order of the Wabash Circuit Court, in which the proceeding was still pending, he was acting as an officer of that court, and was charged with the duty, not only of making such reports to the court as should show the condition of the work as it progressed, but also of asking such further orders and instructions as should prove necessary for its proper completion.* This duty exists independent of statutory provision, but, impliedly at least, it is within the contemplation of Section 6144, Burns 1914, which directs the work of the construction superintendent."

In *Indianapolis, etc., R. Co.* v. *State,* 105 Ind., 37, it was held that where the commissioner was proceeding contrary to the method prescribed, a direct application might be made to the court.

In the case of *Karr* v. *Board,* 170 Ind., 571, 582, it is said:

"Section seven of the act of 1885, concerning drainage (Acts 1885, p. 129, sec. 5628, Burns 1894), provides that the drainage commissioner shall at all times be under the control and direction of the court, and shall obey its directions, and this undoubtedly includes, since the section refers to 'all times,' the orders of the judge in vacation. See, also, Section seven of the act of 1907 (Acts 1907, p. 508, Sec. 6147, Burns 1908); *Michigan Cent. R. Co.* v. *Northern Ind. R. Co.* (1851), 3 Ind., 239; *Pressley* v. *Lamb* (1886), 105 Ind., 171. It may further be said that both *the commissioner and the contractor are agencies or arms of the court, and it is a necessary incident of the authority to construct drains that both shall be under the jurisdiction, and subject to contempt for a disobedience, of the ad interim orders of the court or of the judge thereof in vacation.*"

The language just quoted is a part of the reasoning of the court in the course of an opinion holding that a property owner in Putnam County, who had not been made a party to a drainage proceeding, established by the judgment of the Morgan Circuit Court, could not enjoin the drainage commissioner and contractor, by suit in the Putnam Circuit Court. Continuing, the Supreme Court indulged in the following observations, which show very clearly the court's view that even at the stage indicated the matter still constituted a proceeding over which the Morgan Circuit Court possessed a jurisdiction which, on ordinary principles, should not be interfered with:

"It is against the policy of the law to permit a situation to arise wherein there may be an unseemly conflict of jurisdiction between courts of equal rank in the determination of the ques-

tion as to the extent or proper exercise of the authority of the court which first assumed jurisdiction over the subject-matter (*Scott* v. *Runner* (1896), 146 Ind., 12; 58 Am. St., 345), and, besides, it is inequitable that in a drainage proceeding, wherein jurisdiction may be extended over all persons by supplemental petition (Sec. 5629, Burns 1901, Acts 1885, p. 129, Sec. 8; Sec. 6148 Burns 1908, Acts 1907, p. 508, Sec. 8; *Osborn* v. *Maxinkuckee, etc., Co.* (1900), 154 Ind., 101), a landowner should be permitted to arrest the proceedings by injunction in another court, while refusing to submit himself to the jurisdiction of the court which not only has authority over the construction of the drain, but which has power to make all orders which are meet in the premises."

The case last cited very clearly shows that it is the view in Indiana that during the construction of the drain, the court still continues to act judicially; that the office of commissioner is to all intents and purposes that of a receiver, or, in other words, he is an arm of the court, and that the court has such a jurisdiction over the proceeding at that stage that it would naturally be disposed to protect its officer against what it conceived to be unwarranted acts of interference by the ministerial officers of other courts. In this case, therefore, we do not merely stick in the bark on the literalism of Section 265, but we confidently rely on being protected by the principle of that statute.

The claim that an injunction was sought against a "legislative, executive or administrative act."

It was doubtless possible, in the exercise of the powers of the state government, to have provided for the construction of drains by proceedings which were not, in a strict sense, judicial, but that is not the character of the Act of 1907.

It cannot be said that this proceeding was legislative, for it involved the awarding to the petitioners of their rights under existing laws; nor can it be said to be executive or administrative, although the hearing might have been provided for before a mere board, but in its actual setting it involves a proceeding before a tribunal, in its general character a court, which proceeds, on the acquisition of jurisdiction, to the determination of questions of both law and fact, and which, as the result of the hearing, renders a judgment or decree. This involves a complete conception of a judicial proceeding.

Under that portion of the Drainage Act of 1907, relative to drains ordered and constructed by proceedings in court, we find that remonstrances are filed in open court, issues of both law and fact are formed and determined, changes are provided for from the Judge, findings of fact, either general or special, are made, and judgment is entered thereon, with right to motion for a new trial, and an appeal is authorized to the Supreme Court. In addition, it has been held that the Civil Code of Procedure may be looked to to supply the silences of the Drainage Act, in matters of practice. *Hart* v. *Scott,* 168 Ind., 530.

That the original proceeding was judicial in character does not admit of dispute, and being judicial proceeding in its inception, it remains such until the judgment is executed by the officer or arm of the court, appointed by and acting under its control for that purpose.

In stating that the "final act" is the "construction of the ditch," counsel state the proposition too narrowly; the final act is the determination by a court, having jurisdiction of the parties, after passing on all relevant questions of law and fact, whether the petitioners are entitled to the relief the law awards to them, and, if so, giving judgment in their favor.

It must not be forgotten that we are dealing with a statute which inhibits the use of the writ of injunction in the Federal Court "to stay proceedings in any court of the state," and, while it may be entirely proper not to extend this statute to a legislative proceeding, which may possibly be entertained in a court under the framework of some state governments, and while it is clear that mere executive or administrative proceedings are not protected by the statute, yet what reason can be found, either in the letter of the statute or in the spirit which gives life to it, for holding that a proceeding, although it involves a statutory remedy, had before a court, on the acquisition of jurisdiction over the parties, involving the determination of rights given by law, after the settlement of issues of fact and law, is not a proceeding in a state court?

Put into a court the jurisdiction to determine that a drain be established, as a matter of right under existing law, after the acquisition of jurisdiction

and a hearing had, after the manner of the common law, and there is nothing left to argue concerning the application of the statute, where such proceedings are sought to be enjoined. In principle, we think that some of the cases under the removal statute pre-judge appellant's contention.

In *Boom Co.* v. *Patterson,* 98 U. S., 403, this court held that while the right of eminent domain was a sovereign right, and therefore the proceeding before the commissioners was in the nature of an inquest, yet "when it was transferred to the District Court by appeal from the award, it took, under the statute of the state, the form of a suit at law, and was, therefore, subject to its ordinary rules and incidents." On this ground it was decided that the cause was removable.

To the same effect is *Union Pac. R. Co.* v. *Meyers,* 115 U. S., 2.

In *County of Upshur* v. *Rich,* 135 U. S., 467, it was held that while a proceeding by administrative officers, looking to the valuation of property for the purposes of taxation, was not a suit, and did not become such on appeal to a board of assessors or commissioners having no judicial power, yet, it did become a suit on a further appeal to a court having jurisdiction to determine questions of law and fact.

In the case of *In re The Jarnecke Ditch,* 69 Fed., 161, which involved a proceeding under the Indiana Drainage Act of 1885, which, as to procedure, was practically a counterpart of the act of 1907, it was held, in a carefully prepared opinion by Baker, J., that the proceeding involved the determination of such issues in court as to "present a controversy in the state court in the nature of a civil suit."

Other cases cited by appellant's counsel are not in point.

The case of *Simon* v. *Southern R. Co.*, 236 U. S., 115, involved no more than the granting of a Federal injunction against a party who was seeking to make use of a fraudulent judgment. The facts made out a case for the maintaining of a suit on independent grounds of equity jurisdiction, and the opinion contains a strong statement of the operation of Section 265.

In *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322, the state injunction, granted at the suit of Hunt, restrained a *telegraph company* from discontinuing the *furnishing* of quotations. The *Exchange* then filed a bill to enjoin Hunt from "*receiving*" quotations. The court properly held that the parties and the purposes of the suits were different. Here, as opposite counsel show, the commissioner is a representative party, the officer of the court engaged in the doing of the very act which appellant would enjoin him from doing. A case more plainly within the prohibition of the statute could not be conceived of. No reason existing in the *Hunt* case for not enjoining *Hunt* at the suit of a third party, from *receiving* a service he had no right to, as against such third party, merely because he had obtained an injunction in the state court forbidding some one else from *discontinuing the furnishing* of the service to him.

The case of *Madison Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S., 239, involved merely the power of the Federal Court, after proper steps had

been taken to remove the cause, thus giving the Federal Court jurisdiction, to protect that jurisdiction, by enjoining the plaintiff from further proceeding in the state court. Here the court below could not obtain jurisdiction in the first instance to do what was the sole purpose of the bill, to enjoin proceedings in a state court.

We submit that the judgment of the District Court should be affirmed.

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PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS *v.* CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 258. Argued March 20, 1919.—Decided June 2, 1919.

The District Court has jurisdiction over a suit to enjoin a state officer, acting under color of his official authority, from executing a state law in alleged violation of constitutional rights, even though such injunction may, in effect, render the law inoperative until the constitutional question has been judicially determined. P. 159.

Section 265 of the Judicial Code, forbidding the granting of injunctions by courts of the United States to stay proceedings in any state court, except when authorized in bankruptcy cases, refers only to proceedings in which a final judgment or order has not been entered and in which the power exerted is judicial as distinguished by the Constitution from powers legislative and executive. *Id.*

Where a state law empowers a court, on petition made and on notice to property owners, to establish drainage districts, assess benefits, and appoint commissioners to carry on the work under the court's supervision, a suit in the District Court by a resident of another State, not a party to such a proceeding, to enjoin the commissioner so appointed from constructing a ditch so authorized upon the ground that it would impair plaintiff's constitutional rights in a stream in its State of residence without due process of law is not inhibited by Jud. Code, § 265. *Id.*

Questions of comity and of the sufficiency of the plaintiff's averments to justify relief are not before this court on a direct appeal involving only the jurisdiction of the District Court. P. 162.

Reversed.

THE case is stated in the opinion.

Mr. Buell McKeever, with whom *Mr. Charles W. Smith*, *Mr. Gilbert E. Porter* and *Mr. William G. Beale* were on the briefs, for appellant:

The sole question for the consideration of this court is one of jurisdiction. Jud. Code, § 238; *Mexican Central Ry. Co.* v. *Eckman*, 187 U. S. 429, 432; *Venner* v. *Great Northern Ry. Co.*, 209 U. S. 24, 30; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 121.

The construction of the ditch, whether considered an act of the circuit court of Porter County or an act of the drainage commissioner as an agent of the State, is not a judicial proceeding within the meaning of § 265, but merely a legislative, executive or administrative act, and as such may be enjoined by a federal court.

The distinction between proceedings judicial and proceedings legislative, executive or administrative, although taking place in a body which in its principal aspect is a court, has been repeatedly recognized by this court in construing § 265. Proceedings which are legislative, executive or administrative in character, although taken in a state court, may be enjoined by a federal court. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 225–7; *Mississippi Railroad Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335, 341; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298; *Southern Ry. Co.* v. *Greensboro Ice & Coal Co.*, 134 Fed. Rep. 82, 94; affd. in *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Crapo* v. *Hazelgreen*, 93 Fed. Rep. 316; *Delaware, Lackawanna & Western R. R. Co.* v. *Stevens*, 172 Fed. Rep. 595, 608–610; *Western Union Telegraph Co.* v. *Myatt*, 98 Fed. Rep. 335, 342, 346–347, 355, 360–361; *Weil* v. *Calhoun*, 25 Fed. Rep. 865, 870–871.

After the entry of the final decree of the state court establishing the ditch, confirming the assessments and assigning the construction of the ditch to a drainage commissioner, the proceedings passed beyond the control of the original petitioning land owners, who thereafter had no right or authority either to dismiss the petition or abandon the proposed improvements. Appellee then stood for and represented such land owners. Any collat-

eral attack thereafter upon the ditch proceeding may not be brought against the original petitioners but must be brought against such commissioner. *Board of Commissioners* v. *Jarnecke*, 164 Indiana, 658; *Furness* v. *Brummitt*, 48 Ind. App. 442; *Carter* v. *Buller*, 159 Indiana, 52.

The drainage proceeding was in fact a suit of a private character for the special benefit of the owners of the lands proposed to be drained, who are now represented by appellee. Although appellant because of the state practice may not directly enjoin such owners from obtaining the benefit of the decree establishing the ditch, nevertheless, it should not for that reason be deprived of all relief in a federal court. Since appellee stood for and represented the owners of the lands proposed to be drained, appellant's bill against him was in substance and effect merely a bill to enjoin him from obtaining for such owners the benefit of a decree affecting the property of appellant, which was void as against appellant for want of jurisdiction, and the District Court should have retained jurisdiction of the bill. *Simon* v. *Southern Ry. Co.*, *supra*; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Colorado Eastern Ry. Co.* v. *Chicago, Burlington & Quincy Ry. Co.*, 141 Fed. Rep. 898; *Marshall* v. *Holmes*, 141 U. S. 589, 596–600; *Smyth* v. *Ames*, 169 U. S. 466, 516; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98–101.

Mr. John H. Gillett and *Mr. Frank B. Pattee*, with whom *Mr. Randall W. Burns* was on the brief, for appellee:

The attempt to restrain the drainage commissioner is in effect the same as an attempt to restrain the proceedings. *Dietzsch* v. *Huidekoper*, 103 U. S. 494; *French* v. *Hay*, 22 Wall. 250; *Western Union Telegraph Co.* v. *Louisville &c. R. Co.*, 218 Fed. Rep. 628; *Union Pacific Co.* v. *Flynn*, 180 Fed. Rep. 565; *Rensselaer &c. R. Co.* v. *Bennington &c. R. Co.*, 18 Fed. Rep. 617; *Hyattsville &c. Assn.* v. *Bouic*, 44 App. D. C. 408.

The provisions of § 265 of the Judicial Code extend to the entire proceedings, from the commencement of the suit until the decree is performed. *Sargent* v. *Helton*, 115 U. S. 348; *Chapman* v. *Brewer*, 114 U. S. 158; *Wayman* v. *Southard*, 10 Wheat. 1; *Leathe* v. *Thomas*, 97 Fed. Rep. 136; *Fenwick Hall Co.* v. *Old Saybrook*, 66 Fed. Rep. 389; *Amusement &c. Co.* v. *El Paso &c. Co.*, 251 Fed. Rep. 345.

Section 265 inhibits the granting of an injunction against proceedings in a state court even where the jurisdiction is attacked. *American Assn.* v. *Hurst*, 59 Fed. Rep. 1; *Mills* v. *Provident &c. Co.*, 100 Fed. Rep. 344; *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 Fed. Rep. 453; affd. 190 U. S. 159.

It is not material that the bill seeks to present a constitutional question. *Aultman & Taylor Co.* v. *Brumfield*, 102 Fed. Rep. 7, 11.

The subject-matter was in the possession, actual or constructive, of appellee, as commissioner, who was to all intents and purposes a receiver, and, therefore, the property was *in custodia legis*, and not subject to the writs of other courts. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Palmer* v. *Texas*, 212 U. S. 118.

The mere fact that a stranger may be prejudiced by the proceeding, the defect not appearing on the face of the record, does not render the judgment void.

Even after the rendition of the decree establishing the drain and ordering the work constructed, the cause continued to pend in the state court, to all intents and purposes as in the case of a receivership, with power on the part of the court not only to enforce the direct provisions of the statute concerning the duties of the commissioner, but with power to meet any situation which might develop in the course of the construction of the drain. *Mak-Saw-Ba Club* v. *Coffin*, 169 Indiana, 204; *Rogers* v. *Voorhees*, 124 Indiana, 469; *Murray* v. *Gault*, 179 Indiana, 658; *Steele* v. *Hanna*, 117 Indiana, 333; *Karr* v. *Board*, 170 Indiana, 571.

The proceeding was not legislative, since it involved the awarding of rights granted by existing laws. If the legislature sees fit to make provision for the determination by a judicial tribunal of the right to the relief provided for by the statute, after an inquiry involving the determination of questions of law and fact, had after the manner of the common law, such proceedings are judicial, and the proceedings constitute a suit in the state court, concerning which the District Court of the United States cannot interfere from the time that the petition is filed until the drain is constructed and the commissioner discharged. *Boom Co.* v. *Patterson*, 98 U. S. 403; *Union Pacific R. Co.* v. *Myers*, 115 U. S. 1; *County of Upshur* v. *Rich*, 135 U. S. 467; *In re The Jarnecke Ditch*, 69 Fed. Rep. 161.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

An "Act concerning drainage," passed in Indiana in 1907, briefly outlined is as follows: (1) It authorized the appointment by the county commissioners of each county of an officer called a drainage commissioner and made the county surveyor also ex officio such an officer. (2) It empowered a defined circuit court, on the petition of private land owners or of municipal or other public bodies representing public ownership, to establish a drainage district and to authorize the carrying out in such district of the work petitioned for, and gave the court authority to appoint an additional drainage commissioner, the three being directed to aid the court to the extent by it desired in securing data concerning the questions required to be passed upon in disposing of the petition. (3) To accomplish the purposes of the statute, personal notice to known property holders and notice by publication to those unknown was exacted, and the court was empowered to reject the whole suggested scheme or to authorize such part

of it as might be deemed best, or to devise and sanction a new plan. (4) As to any plan which it authorized, the court was empowered to provide for the cost of the work by distributing the amount upon the basis of the benefits to be received and the burdens to result to each land owner. (5) It authorized the designation by the court of one of the drainage commissioners, or if it deemed best, of any other resident of the district, to carry into execution under the general supervision of the court any work authorized, with power to contract and subject to accountability to the court as the work progressed and at its conclusion.

The Little Calumet River, rising in the State of Indiana, flows in a westerly direction across Porter and Lake Counties in that State into Cook County, Illinois, within whose boundaries it commingles with the Grand Calumet which empties into Lake Michigan.

After proceedings under the statute, the circuit court of Porter County, in May, 1911, established a drainage district in Porter and Lake Counties and authorized the construction of a ditch to proceed from the Little Calumet River in a northerly direction to Lake Michigan. This action of the court was taken to the Supreme Court of Indiana and there affirmed (182 Indiana, 178), and on error from this court was also affirmed (242 U. S. 375).

Before work on the ditch was commenced, however, the appellant, an Illinois corporation which was not a party to the proceedings to establish the district, brought this suit against Corboy, the drainage commissioner appointed by the court to do the work, to enjoin the execution of the same. The relief prayed was based on the ground that the effect of the ditch would be to draw off from the Little Calumet River, an interstate stream, such a quantity of water as to seriously diminish the flow in that river and thereby practically cripple, if not destroy,

the capacity of petitioner to continue to operate a plant for the production of electrical energy established and owned by it on the banks of the Little Calumet in Cook County, Illinois. It was alleged that the right to have the river flow in its normal volume was a property right enjoyed by petitioner under the law of Illinois, protected by the constitutions both of the State and of the United States, and which therefore could not be impaired or taken away without depriving the petitioner of property in violation of due process of law as afforded by both constitutions. The court, being of opinion that the relief prayed was prohibited by § 265 of the Judicial Code, dismissed the bill for want of jurisdiction. The case is here by direct appeal on that question alone.

Although a State may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. The doctrine is elementary, but we refer to a few of the leading cases by which it is sustained: *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 392; *Ex parte Young*, 209 U. S. 123, 152; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 230; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506.

There was jurisdiction therefore in the court below as a federal court to afford appropriate relief unless the want of power resulted from the prohibition of § 265 of the Judicial Code, which is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction

may be authorized by any law relating to proceedings in bankruptcy."

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, the facts, briefly stated, were these: By the constitution and laws of Virginia the Corporation Commission of that State was constituted a court and was authorized in that capacity to establish railroad rates and to enforce them. The authority thus conferred was exerted and the jurisdiction of a court of the United States was invoked to enjoin the Commission from enforcing the rates so fixed on the ground that to put them in operation would amount to a confiscation of the property of the railroad and hence would be repugnant to the Constitution of the United States. The power to afford relief was challenged on the ground that as the Corporation Commission was a court under the constitution and law of the State, its proceedings could not be stayed by a court of the United States because of the prohibition of § 265 of the Judicial Code. It was held, however, that as the power to fix rates was legislative and not judicial, the prohibition had no application and the injunction prayed was granted.

In *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, suit was brought in a court of the United States by the Railway Company against Simon to enjoin the enforcement of a judgment which had been rendered in a state court in favor of Simon and against the Railway Company on the ground of want of notice and fraud. Asserting that to grant the relief would be to stay proceedings in the state court, the jurisdiction was disputed, based upon the prohibition of the section previously quoted. The jurisdiction was upheld and it was decided that although the prohibition might have prevented the granting of an injunction staying proceedings before the judgment was rendered, it did not so operate after the entry of the final judgment because "when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors

to use such judgment—a new state of facts, not within the language of the statute may arise." The execution of the judgment was therefore enjoined.

This conclusion was sustained by the text as elucidated by the purely remedial purposes intended to be accomplished by its enactment. The court thus stated the origin of the statute as illustrative of its remedial scope (pp. 123–4):

"In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court,—in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. It was also true that the courts of equity of one State or country could enjoin its own citizens from prosecuting suits in another State or country. *Cole* v. *Cunningham*, 133 U. S. 107. This, of course, often gave rise to irritating controversies between the courts themselves which could, and sometimes did, issue contradictory injunctions.

"On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed."

Be this as it may, it is certain that the prohibitions which the statute imposes secure only the right of state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests and property, in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the *Prentis Case*, by which it is made certain that although a State may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by

the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.

It follows necessarily, therefore, that although the Constitution did not limit the power of the States to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its exertion, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which in their constitutional sense were non-judicial in character and therefore not within the implied or express limitation by which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject-matter with which they are called upon to deal, but merely upon a state classification.

This conclusion renders it unnecessary to consider whether the construction of the ditch under the authority of the state statute, isolatedly considered, could be regarded as a judicial proceeding within the meaning of the statute, or whether, putting that view aside under the assumption that the proceedings were judicial, the order for construction could be treated as final and for that reason alone capable of being stayed, within the ruling of *Simon* v. *Southern Ry. Co.*

The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but as on this direct appeal we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our

consideration. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225. This moreover puts out of view the argument advanced concerning the adequacy of the averments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause.

Our order, therefore, is that the decree be reversed and the case be remanded for further proceedings in conformity with this opinion.

Reversed.